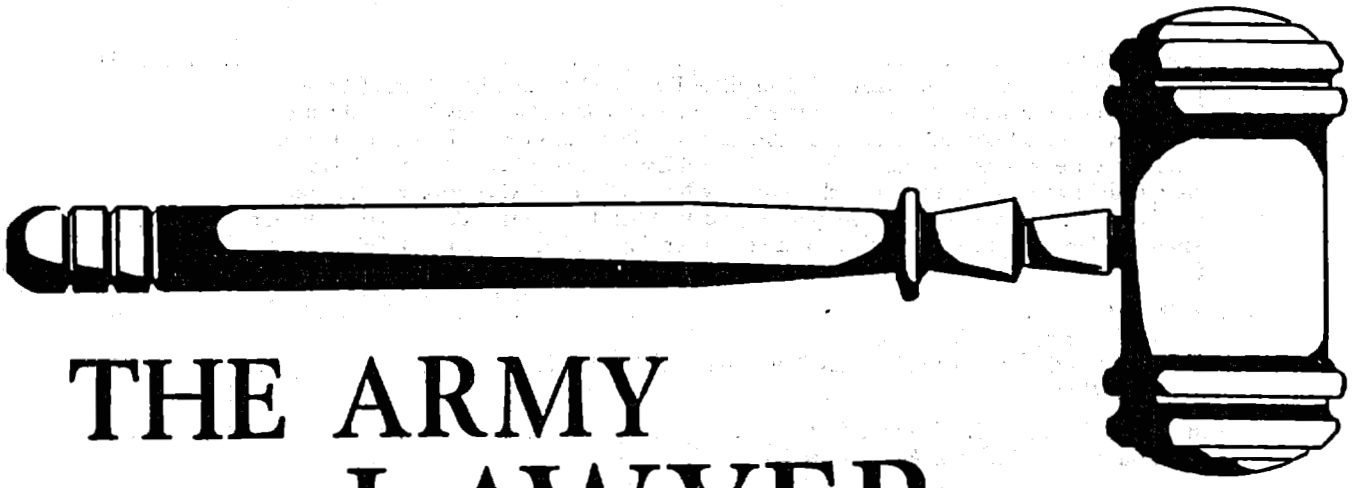

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TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law

On December 4, 1987, The Judge Advocate General's School became the nation's only government agency statutorily authorized to confer the degree of Master of Laws (LL.M.) in Military Law. The School's degree conferring authority was included in the "Defense Authorization Act," signed into law by President Reagan. As stipulated in 10 U.S.C. 4315,

> Under regulations prescribed by the Secretary of the Army, the Commandant of The Judge Advocate General's School of the Army may, upon the recommendation of the faculty of such school, confer the degree of Master of Laws (LL.M.) in Military Law upon graduates of the school who have fulfilled the requirements for that degree.

This authority to accord a Master of Laws to graduates of the School's Graduate Course is the result of intensive efforts initiated, at the direction of Major General Hugh R. Overholt, The Judge Advocate General, by TJAGSA in January, 1986. Initial inquiries by School representatives revealed that federal policy governing the granting of academic degrees by federal agencies and institutions requires that the Secretary of Education favorably recommend that a federal institution be accorded statutory degree-granting authority. To gain this positive recommendation, moreover, federal agencies must, in compliance with detailed procedures published in 1954 and modified in 1986, petition the Secretary of Education for program review and approval. A successful petition results in Secretarial recommendation to Congress that the degree-granting program under review be statutorily authorized.

Following extensive coordination between TJAGSA representatives and those of the Department of Education, and with the invaluable assistance of Dr. Leslie W. Ross, Chief of the Education Department's Agency Evaluation Branch, Mr. Delbert L. Spurlock, Jr., Assistant Secretary of the Army for Manpower and Reserve Affairs, submitted the Department of Army's formal petition for TJAGSA degree-granting authority to the Department of Education on November 26, 1986. This petition included documentation designed to demonstrate the School's compliance with specific criteria established by the Department of Education for the purpose of evaluating programs for which government agencies seek to gain graduate degree granting authority. Also included, as an essential aspect of this petition request, was a letter from Dean James P. White, Consultant on Legal Education to the American Bar Association, attesting that, since 1958, TJAGSA's Graduate Course program had been accredited by the American Bar Association as a specialized program beyond the first degree in law.

As a part of the petition review process, the School Commandant, Colonel Jack Rice, appeared before the fifteen-member National Advisory Committee on Accreditation and Institutional Eligibility (NACAIE) on December 1, 1986, to formally present the School's request for degree-granting authority and to respond to committee members' questions concerning the School and its graduate program. This presentation included a videotape, produced by the School's Audio-Visual Department, focusing on TJAGSA and the School's Graduate Course. Also appearing with the Commandant before the committee was the Honorable Robinson O. Everett, Chief Judge of the U.S. Court of Military Appeals, a representative of the American Bar Association present for the purpose of confirming to committee members the ABA's continuing accreditation of the School's graduate program.

A positive recommendation by the NACAIE that the Secretary of Education recommend to Congress that degree-granting authority be accorded a particular government agency is essential. Thus, it was with a sense of pride and accomplishment on the part of those TJAGSA representatives present at the committee hearing that, upon the conclusion of the Commandant's presentation, the NACAIE voted unanimously to advise Secretary Bennett that he recommend that Congress statutorily authorize the School to award an LL.M. in Military Law.

On March 27, 1987, acting upon the unanimous recommendation of the NACAIE, the Secretary of Education, William J. Bennett, formally recommended to Congress that it favorably consider granting TJAGSA statutory authority to award a Master of Laws to graduates of its Graduate Course. Acting upon this positive Secretarial recommendation, the Department of Army sent draft legislation to Congress designed to effect the School's degree-granting authority.

As a result of the support and sponsorship of Congresswoman Beverly Byron, Chairwoman of the Subcommittee on Military Personnel and Compensation of the House Armed Services Committee, the proposed TJAGSA legislation was included in the House version of the 1988 Defense Authorization Bill and, with the agreement of the Senate, incorporated in the legislation signed into law by President Reagan on December 4, 1987.

TJAGSA's effort to achieve statutory authority to award an LL.M. in Military Law could not have been successful without the commitment and support of many individuals. The staff and faculty of the School responded to every request for the information necessary to submit to the Department of Education a professional and effective petition for graduate program review. Dr. Les Ross of the Department of Education was instrumental in assisting TJAGSA representatives in their preparation of supporting documentation, and the American Bar Association, particularly as represented by Dean James P. White and Chief Judge Robinson O. Everett, provided invaluable support for TJAGSA in its appearance before the NACAIE. Essential legislative advice and expertise were provided by Colonel Fred K. Green, Office of the Secretary of Defense, and Colonel John K. Wallace, Office of Legislative Liaison, Department of the Army. Finally, the Corps, as a whole, is indebted to Assistant Secretary Del Spurlock and to Congresswoman Beverly Byron, without whose support TJAGSA's goal of achieving degree-granting authority would never have been realized.

An advisor to the Section of Legal Education and Admissions of the American Bar Association once advised the House Armed Services Committee that:

> The advanced work offered by the [Army JAG] School is not duplicated elsewhere. Graduate work in specialized fields is offered by only a few institutions, . . . but [they] do not duplicate the work of the School. Nor should they duplicate it. I have visited each [institution] and am familiar with its work. The studies required by the School for the completion of its program are as exacting, if not more, than those of any . . . institution.
>
> In short, the advanced program of the School is, in my considered judgment, unequaled in any law school in America. . . .

Offered in 1962, these words have taken on increased validity over the past twenty-five years. No law school, other than TJAGSA, has established a graduate legal program specifically designed to meet the School's primary objective of preparing military attorneys to assume positions of significant responsibility requiring specialized training in military law. The uniqueness and quality of TJAGSA and its graduate legal program now have been recognized by Congress, a legislatively mandated recognition that evidences the professionalism of each TJAGSA Graduate Course graduate and one in which all members of the Corps, past and present, may take justifiable pride. Beyond this, however, this long awaited form of congressional recognition should instill, in all members of the Regiment, a sense of rededication to the legal profession and the Army we serve.

The Fall and Rise of Global Settlements: How Will They Fare in an Age of Voluntary Disclosure?

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Introduction

The debarment or suspension from government contracting of a major defense contractor is an economic event of catastrophic proportions to the corporation involved. In Fiscal Year 1985, the top five defense contractors for that year—McDonnell Douglas, General Dynamics Corporation, Rockwell International Corporation, the General Electric Company, and the Boeing Company—were awarded between $5.5 billion and $8.9 billion each in major defense contracts.[1] This represented 22.5% of the $150.7 billion in Department of Defense (DOD) prime contracts over $25,000 awarded in 1985.[2] The debarment or suspension of any of these five or of any other major defense contractor could mean the closing of large industrial plants, the firing of thousands of workers, and the permanent loss of a major military-industrial competitor.

The fraudulent acts of an individual employee or officer may be imputed to an entire corporation if the acts occurred in the performance of corporate duties, on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence.[3] Thus, a resolution by the corporate directors or officers to "do no wrong" can often be useless. A government contractor can easily find itself faced with serious accusations of criminal conduct under "wide-ranging and flexible" criminal statutes,[4] debarment and suspension proceedings with the Department of Defense,[5] and civil fraud proceedings or administrative recovery actions.[6]

In such a predicament, a global settlement has often been the means by which a major defense contractor could resolve criminal, civil, and administrative proceedings with the government through a comprehensive agreement involving all interested parties.[7] The usual components of a global settlement have been a plea agreement with the Criminal Division of the Department of Justice (DOJ), an agreement on civil damages with the Civil Division of DOJ, and an agreement with DOD concerning debarment and suspension.[8]

Over the last year or so, however, the use of global settlements has appeared to be dying out.[9] Opposition to global settlements within various parts of the government[10] has caused at some to conclude that there will be no more global settlements in the future.[11] This article addresses the background of the current situation, the impact of the

*This article was originally prepared as a research paper in partial satisfaction of the requirements of the 35th Judge Advocate Officer Graduate Course.

[1] Fed. Cont. Rep. (BNA) No. 9, at 360 (Mar. 3, 1986).

[2] *Id.*

[3] Federal Acquisition Reg. § 9.406.5 (1 Apr. 1984) [hereinafter FAR].

[4] Graham, *Mischarging: A Contract Cost Dispute or a Criminal Fraud?*, 14 Pub. Cont. L.J. 243 (1985).

[5] FAR §§ 9.400 to 9.407–5.

[6] Fed. Cont. Rep. (BNA) No. 16, at 760–65 (Oct. 27, 1986).

[7] Bennett & Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 Pub. Cont. L.J. 30 (1986) [hereinafter Bennett].

[8] *Id.* at 43.

[9] *Id.* at 30.

[10] Inside the Pentagon No. 45, at 6 (Nov. 14, 1986).

[11] Fed. Cont. Rep. (BNA) No. 5, at 212 (Feb. 2, 1987).

DOD policy concerning voluntary disclosure of procurement fraud upon global settlements, and the reasons why the author believes that global settlements are here to stay.

Some Recent History

Over the past two years, DOD and DOJ have expressed increasing opposition to the use of global settlements while at the same time the contracting community has expressed continuing dissatisfaction with the debarment and suspension system. The contractors' dissatisfaction ultimately achieved a resolution of sorts through the promulgation of the DOD Program for Voluntary Disclosures of Possible Fraud by Defense Contractors, sometimes called the Taft letter.[12]

The Federal Acquisition Regulation (FAR) provisions relating to debarment and suspension[13] provide debarring and suspending officials with the discretion to debar or not to debar a contractor upon conviction or civil judgment for certain fraud-type offenses,[14] or to suspend or not suspend a contractor upon indictment or other adequate evidence of the commission of the same type of offense.[15] The FAR emphasizes consideration of the "present responsibility" of a government contractor or subcontractor in determining whether or not to debar[16] or suspend the contractor.[17] Contractors complain, however, that an indictment or conviction for the past misdeeds of a few low-level employees who are no longer employed by the contractor has no bearing on the contractor's present responsibility.[18] The contracting community has therefore attacked as "unreasonable" the linkage between the past offense and a determination of present responsibility, arguing that present responsibility relates to the present and future integrity of a government contractor, whereas an indictment always relates to the contractor's past conduct.[19] In most cases, however, debarring and suspending officials ignore these arguments, and debarment following conviction, or suspension following indictment, is "virtually inevitable"[20] or "automatic"[21] in practice.

Others have attacked the suspension and debarment system by charging that sloppy cost accounting standards, vague cost indices, faulty purchase order systems, and government mismanagement are at the root of much of what DOD has characterized as fraud against the government.[22] Therefore, the argument goes, the current regulatory approach used by DOD to deal with fraud in military procurement fails because it does not address DOD's own role in contributing to fraud. Furthermore, they argue that DOD's broad authority to identify wrongdoers and impose severe sanctions has allowed DOD to shift the blame for excessive and wasteful military spending practices to defense contractors in a selective manner.[23]

The White House Blue Ribbon Commission on Defense Management headed by David Packard (the Packard Commission) dealt with many of these concerns. Beginning in August 1985, the Packard Commission reviewed the federal acquisition system as part of a mandate to study the overall organization and management of the Pentagon.[24] The Packard Commission reported that a high level of mutual distrust existed between DOD and the defense industry because of the manner in which DOD exercises its powers of suspension and debarment. The Commission also reported that the threat of debarment or suspension had become the government's primary negotiating weapon in criminal prosecutions to force contractors to enter guilty pleas.[25]

The Packard Commission recommended that DOD reconsider its practice of automatic suspension of a contractor following the contractor's indictment on charges of contract fraud, and its practice of suspending or debarring the contractor's whole organization based on the wrongdoing of only one component part. The Commission also urged DOD to consider greater use of broadened civil remedies instead of suspension (where suspension was not mandated), and to implement a program dealing with the voluntary disclosure of fraud, including incentives for making such disclosures. The Packard Commission further recommended revising FAR to make it clear that suspension and debarment should not be imposed solely as a result of an indictment or conviction predicated upon former (not ongoing) conduct, nor should they be used punitively.[26]

At about the same time the Packard Commission was making its findings and recommendations, the opposition to global settlements within the government was reaching a peak. In late 1985, then-DOD Inspector General Joseph Sherick said that his office would oppose any settlements proposed in contractor fraud cases that did not include criminal convictions, full civil recovery, and debarment of the contractor and all responsible individuals, unless strict alternative conditions were met.[27] Because the critical provision of any global settlement from the contractor's point of view is an agreement that no suspension or debarment

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[12] Fed. Cont. Rep. (BNA) No. 6, at 292 (Aug. 11, 1986); *see infra* notes 34–37 and accompanying text.

[13] FAR §§ 9.400 to 9.407–5.

[14] FAR § 9.406–2.

[15] FAR § 9.407–2.

[16] FAR § 9.406.2(a)(4)–(c).

[17] FAR § 9.407.2(a)(4)–(c).

[18] Bennett, *supra* note 7, at 31.

[19] *Id.*

[20] Bennett, *supra* note 7, at 34.

[21] Inside the Pentagon No. 27, at 10 (July 4, 1986).

[22] Note, *Regulating Fraud in Military Procurement: A Legal Process Model*, 95 Yale L.J. 390, 393–94 (1985).

[23] *Id.* at 391.

[24] Fed. Cont. Rep. (BNA) No. 8, at 314 (Feb. 24, 1986).

[25] Inside the Pentagon No. 27, at 10 (July 4, 1986).

[26] *Id.*

[27] Inside the Pentagon No. 28, at 10 (July 11, 1986).

will result either from the fact of indictment or conviction, or from the underlying facts discovered during a government investigation,[28] Mr. Sherick's attitude narrowed the focus of global settlement negotiations to a "surrender-or-die" proposition.

DOJ made its opposition to global settlements known even more clearly. In discussions with DOD officials in late 1985, DOJ officials stated that DOJ would no longer attempt to settle "globally" criminal, civil, and administrative cases involving DOD contractors.[29] DOJ officials were reportedly concerned about criticism that global settlements often resulted in lax punishment of wrongdoing, and that criminal action was being delayed too long when DOJ waited for a resolution of civil and administrative cases.[30] The Chief of the Fraud Section of DOJ's Criminal Division also stated that speeding up the resolution of administrative cases would remove DOJ's resistance to the use of such settlements.[31] DOJ officials believed that debarring officials have the ability to act quickly when pressed and that DOJ, by reducing its own involvement in the administrative process, would force DOD and other agencies to deal quickly and efficiently with suspensions and debarments to protect their own interests.[32] As a result, while DOD developed its voluntary disclosure program in the summer of 1986, DOJ officials pursued its fraud cases on a separate track.[33]

The Taft Letter

DOD's efforts to comply with the recommendations of the Packard Commission culminated with a letter issued by Deputy Secretary of Defense William H. Taft IV, dated 24 July 1986.[34] Addressed to the eighty-seven top defense contractors (not including educational institutions), the letter seemed to offer an alternative to global settlements as a way to avoid debarment and suspension. The letter referred to a policy of some unidentified major defense contractors of voluntarily disclosing problems affecting their corporate contractual relationships with DOD. The letter stated that these contractors disclosed these problems without "an advance agreement regarding possible DOD resolution of the matter." It went on to say that these contractors understand DOD's view that early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of contractor integrity even in the wake of disclosures of potential criminal liability. The letter stated "We will consider such cooperation as an important factor in any decisions that the Department takes in the matter." The letter concluded by encouraging contractors to consider adopting a policy of voluntary disclosure, and referred to an enclosed description of the DOD Program for Voluntary Disclosures of Possible Fraud by Defense Contractors. This program discussed the advantages of the voluntary disclosure of information otherwise unknown to the government, and of contractor cooperation in an ensuing investigation.[35] These advantages include: the likelihood that the government can recoup losses of which it might otherwise be unaware; that limited detection assets within the government can be augmented by contractor resources; that consideration of appropriate remedies can be expedited by both DOD and DOJ when adversarial tensions are relaxed; that contractors engaged in voluntary disclosure are more likely to institute corrective actions to prevent recurrence of disclosed problems; and that voluntary disclosure and cooperation are indicators of contractor integrity.

The Program limits the status of a "volunteer" to a contractor who can meet four criteria: that the disclosure was not triggered by the contractor's recognition that the underlying facts were about to be discovered by a government audit, investigation, or contract administration efforts, or reported by a third party; that the disclosure was on behalf of the business entity and not just an admission by individual officials or employees; that the contractor took prompt and complete corrective action in response to the matters disclosed, including disciplinary action and restitution to the government, where appropriate; and that after disclosure, the contractor cooperates fully with the government in any ensuing investigation or audit.

The definition of "cooperation" depends on the facts of each case, but DOD can enter into a:

> written agreement with any contractor seeking to make a voluntary disclosure where such an agreement will facilitate follow-on action without improperly limiting the responsibilities of the Government. This agreement, which may be coordinated with the Department of Justice, will describe the types of documents and evidence to be provided to DOD and will resolve any issues related to interviews, privileges, or other legal concerns which may affect the DOD ability to obtain all relevant facts in a timely manner.[36]

This language seems to contemplate an agreement that would neither slow down any criminal prosecution instituted by DOJ nor bar any action required by DOD to "nail" the errant contractor. The primary purpose of such an agreement would be to assure the volunteer that the disclosure would not be unlimited as to the amount of information to be provided.

For the true volunteer, the program offers three things: the early identification of one of the military departments or the Defense Logistics Agency as the DOD representative for debarment and suspension purposes, allowing the contractor to concentrate its persuasive efforts on one agency; a promise that DOD will attempt to expedite the completion of any investigation and audit conducted in response to a

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[28] Bennett, *supra* note 7, at 36.

[29] Inside the Pentagon No. 45, at 6 (Nov. 14, 1986).

[30] *Id.*

[31] Fed. Cont. Rep. (BNA) No. 3, at 90 (July 15, 1985).

[32] Bennett, *supra* note 7, at 38.

[33] Inside the Pentagon No. 28, at 1 (July 11, 1986).

[34] Fed. Cont. Rep. (BNA) No. 6, at 292-94 (Aug. 11, 1986).

[35] *Id.* at 292.

[36] *Id.*

voluntary disclosure, thus minimizing the time required for the government to decide upon an appropriate remedy; and a promise that DOD will advise DOJ of the complete nature of the voluntary disclosure, the extent of the contractor's cooperation, and the types of corrective action instituted by the contractor, leaving the determination of appropriate criminal and civil fraud sanctions to DOJ.[37]

Aftermath of the Taft Letter

Unfortunately, DOD was unable to obtain DOJ's blessing of this program before Mr. Taft sent out the letter, and as a result, several concerns were raised at the 9 August 1986 meeting of the American Bar Association's Contract Law Section. For example, section members noted that the information subject to voluntary disclosure extended far beyond possible criminal conduct, and that the government had waived none of its rights to prosecute contractors and then debar them based upon any resulting conviction. Litton Industries counsel Norman Roberts told of a recent case of voluntary disclosure where DOJ insisted that the contractor plead guilty before any related administrative issues, such as debarment and suspension, were resolved. Roberts expressed great concern about DOJ's position that contractors must either plead guilty or go to trial and face debarment if convicted.[38] In the past, of course, a contractor could attempt to negotiate a global settlement with DOD and DOJ that would cover the extent to which the government would exercise each of its possible remedies in return for the contractor's cooperation, guilty plea, and so on.

At the procurement fraud committee meeting the next day, panel members criticized DOD for lacking a coherent policy on global settlements.[39] One panel member, however, stated that the practical effect of the voluntary disclosure policy was that DOD's policy of automatic debarment of contractors convicted of a felony was gone.[40]

An additional issue raised the day before concerned the role of corporate counsel in this problem, and the effect of the "corporation as policeman" on attorney-employee relations.[41] This issue was again raised at the BNA/FBA Western Briefing Conference in October 1986. Attorney Allan Joseph, in speaking about voluntary disclosure to the group, stated that an employee who gives the contractor information about improper actions in the company should also receive the benefit of having made the voluntary disclosure. General Electric Co. vice president and deputy counsel Joseph Handros said that his company, in making a voluntary disclosure, did not attribute the activity in question to particular individuals, in order to avoid pinpointing individual employee culpability. Instead, General Electric officials would leave it to the government to pinpoint the individuals involved where misconduct stretched over an appreciable period of time.[42]

Meanwhile, DOJ continued to pursue its separate approach to fraud cases into the fall of 1986, despite concerns within DOD that the voluntary disclosure program would "fall flat on its face" without DOJ's involvement.[43] There were indications, however, that DOJ would be forced to rethink its policy on global settlements in response to the voluntary disclosure program.[44] Speaking at an American Corporate Counsel Association seminar on 12 November, Defense Procurement Fraud Unit[45] chief Morris Silverstein said that DOJ would not act as "broker" in global settlements involving DOJ, DOD, and a contractor. Silverstein also said that DOJ would make the decision to prosecute, and would prosecute even if the debarment/suspension issue with DOD was not resolved. He suggested, however, that a contractor who was considering a plea agreement should make sure that it would not be debarred or suspended before it entered into such an agreement. Silverstein also stated that voluntary disclosure should be only one of several factors to be considered in determining whether to prosecute a procurement fraud case.[46]

In spite of DOJ's position, a global settlement involving DOJ was used to resolve a major fraud case involving C-3, Inc., in November 1986. Speculation thus arose that global settlements might become widespread if DOJ were to come out in support of the voluntary disclosure program.[47] Then on 5 February 1987, DOJ issued a letter that strongly endorsed the voluntary disclosure program. DOJ said that it would consider voluntary good faith disclosures when deciding whether to press criminal charges, and would be more lenient in cases involving companies with solid prevention programs in place, and in cases where company officials came forward promptly when wrongdoing was suspected.[48]

While the new DOJ policy supports the voluntary disclosure program to an extent, it in no way endorses the use of global settlements. Given this continued resistance by DOJ, and the Taft letter's suggestion that voluntary disclosures will normally be made without an advance agreement about debarment or suspension, a short future would seem to be in store for global settlements. In the author's opinion, however, global settlements are here to stay and will frequently be used out of necessity in the future for a number of reasons.

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[37] *Id.* at 293.

[38] Fed. Cont. Rep. (BNA) No. 7, at 310 (Aug. 18, 1986).

[39] *Id.* at 311.

[40] Fed. Cont. Rep. (BNA) No. 16, at 740 (Oct. 27, 1986).

[41] Fed. Cont. Rep. (BNA) No. 7, at 311 (Aug. 18, 1986).

[42] Fed. Cont. Rep. (BNA) No. 16, at 740 (Oct. 27, 1986).

[43] Inside the Pentagon No. 6, at 2 (Feb. 6, 1987).

[44] Inside the Pentagon No. 44, at 12 (Nov. 7, 1986).

[45] The Defense Procurement Fraud Unit is part of DOJ but has been assigned attorneys, investigators, and auditors from DOD.

[46] Fed. Cont. Rep. (BNA) No. 20, at 901 (Nov. 24, 1986).

[47] Inside the Pentagon No. 45, at 6 (Nov. 14, 1986).

[48] Fed. Cont. Rep. (BNA) No. 8, at 303-05 (Feb. 23, 1987).

The Case for Global Settlements

Chief among these reasons is that the combined self-interests of contractors, the Department of Defense, and the Department of Justice will ultimately overcome the fear of the political heat involved in making global settlements.

Contractors, whether or not they have voluntarily disclosed fraud, are still going to want the uncertainties of a procurement fraud case resolved through agreements with DOD and DOJ. As the Taft letter indicated, DOD is still willing to make written agreements (which may be coordinated with DOJ) prior to the voluntary disclosure to limit the disclosure and to resolve any legal concerns. Furthermore, the DOD Inspector General's (IG) office is willing to agree that a voluntary disclosure report will be kept confidential and will not be disclosed to shareholders; and that submitting the report to the IG will not in itself constitute a waiver of the attorney/client and work product privileges.[49] This agreement may also resolve the concerns about employees being left in the lurch. Any advantages of reporting wrongdoing by employees, such as distancing the company from the illegal behavior of the employees, must be weighed against the severe morale problems that could arise as a result, as well as the potential for libel charges.[50] DOD cannot, however, make commitments as to what charges can be brought against a contractor or its employees.

Furthermore, DOD does not have access to the local grand juries, which are under the control of the local U.S. Attorney. Therefore, a voluntary disclosure to DOD may lead to a lengthy grand jury process in the absence of an agreement with DOJ, which could take the form of a global settlement.

But while the "guilty" contractor will want agreements with both DOD and DOJ, it may not want to connect them in any way. The voluntary disclosure program is not intended to be "an amnesty program," according to Assistant Defense Inspector General Michael Eberhardt.[51] Nevertheless, under the present state of affairs, if a contractor can make a "voluntary disclosure" to DOD that will probably protect it against debarment and suspension, it will be in a fairly good bargaining position with DOJ in negotiating any plea agreement.

DOD also has a significant stake in renewing the global settlement concept. The voluntary disclosure program arose from the conclusion that "no conceivable number of additional federal auditors, inspectors, investigators and prosecutors can police the acquisition process fully, much less make it work more effectively."[52] For the voluntary disclosure program to work, with the consequent savings to the government in the form of money recovered and investigative resources conserved, the contractor is going to have to believe that it is in its best corporate interests to disclose evidence of potential fraud. The best way for DOD to convince the contractor of this is for DOD and DOJ to be seen as acting in concert. This could be shown by "slamming" a non-disclosing contractor with debarment/suspension and criminal charges, while rewarding a "volunteer" with prosecutorial leniency and minimal or no debarment or suspension. Creating the impression, whether or not it is accurate, that DOJ will treat "volunteers" more lightly should help tilt the balance towards disclosure in the minds of recalcitrant contractors who discover internal fraud. The more closely DOD works with DOJ on these cases, the stronger DOD's bargaining position becomes, and the more likely it will become that its voluntary disclosure program will succeed.

Another significant advantage of a global settlement policy is that it would strengthen DOD's bargaining position on other contracting issues with that contractor. As an example of what is possible in this area, consider the General Dynamics suspension. The Navy suspended General Dynamics from government contracting for two months the day after its indictment in December 1985 on charges of improperly shifting cost overruns on a prototype of the division air defense gun (DIVAD). To end the suspension, General Dynamics established a $50,000,000 escrow account to cover potential liabilities resulting from the indictment. It also agreed to government monitoring of fifty remedial actions imposed by DOD, to reimburse the government $500,000 in administrative costs incurred during the suspension, and to settle twenty other cost issues that resulted in a savings to DOD of $22,000,000.[53] Although Secretary Weinberger was correct in saying of DOD's debarment and suspension authority, "Our interest is not in lining up companies that can't bid on government work,"[54] DOD loses bargaining power over unrelated contract issues by virtually guaranteeing that no debarment or suspension will take place in a voluntary disclosure case.[55] By tightening the linkage between criminal charges and any settlement with DOD, however, thereby playing on the contractor's fear of DOJ, DOD strengthens its hand in fraud cases involving a voluntary disclosure.

Another advantage of DOD's coordinating its action with DOJ is a purely political one. If DOJ indicts or convicts a contractor that DOD has decided not to suspend or debar, DOD will be seen as politically insensitive, and perhaps immoral, in continuing to deal with a "bunch of criminals."[56]

Furthermore, despite a recent General Accounting Office report that says defense contractors were 35% more profitable than commercial manufacturers from 1970 to 1979 and 120% more profitable from 1980 to 1983,[57] the defense industry is undergoing a retrenchment in the wake of

[49] Fed. Cont. Rep. (BNA) No. 16, at 740 (Oct. 27, 1986).

[50] Inside the Pentagon No. 45, at 6 (Nov. 14, 1986).

[51] Fed. Cont. Rep. (BNA) No. 8, at 353 (Aug. 25, 1986).

[52] Inside the Pentagon No. 27, at 10 (July 4, 1986).

[53] Fed. Cont. Rep. (BNA) No. 6, at 236–37 (Feb. 10, 1986).

[54] Fed. Cont. Rep. (BNA) No. 17, at 801 (Nov. 3, 1986).

[55] As of January 21, 1987, none of the contractors who have voluntarily disclosed wrongdoing has been subjected to debarment, suspension, or criminal charges, according to a report in Fed. Cont. Rep. (BNA) No. 5, at 212 (Feb. 2, 1987).

[56] Bennett, *supra* note 7, at 40.

[57] Fed. Cont. Rep. (BNA) No. 1, at 12 (Jan. 5, 1987).

Gramm-Rudman legislation. Wall Street analysts are reportedly warning investors to steer away from investment in the defense industry, warning that growing DOD efforts to curb profits, cut progress payments, and increase competition make defense contractor stocks less attractive. With more and more contractors competing for the programs that do exist, these same analysts are worried that earnings will fall. Additionally, the new tax law is expected to hurt defense contractors.[58] All of these economic conditions may eventually increase the pressures on lower level contractor employees to mischarge and overcharge the government, and the motivation for voluntarily disclosing such fraud may lose some of its luster if the environment does not change.

DOD's interests, in an era in which fraud may increase as available procurement money decreases, lie in convincing contractors that voluntary disclosure is the best way to react to an internal discovery of contract fraud. Coordination with DOJ will help get this message through, and will improve DOD's bargaining position with "disclosing" contractors. A policy that accepts global settlements as the normal outcome of a contract fraud case will allow DOD and DOJ to coordinate their actions more closely.

As for DOJ, it has an even greater interest in maintaining a linkage with any DOD settlement of a fraud case. In the absence of cooperation, DOJ will find its caseload rapidly increasing at the same time that it finds itself contesting and probably losing many more complicated procurement fraud cases. While new anti-fraud legislation[59] will increase the government's ability to pursue contract fraud, thereby resulting in more fraud cases, DOJ probably will not be able to handle the additional burden on its already heavy caseload because DOJ is not getting any new prosecutors.[60] In addition to the sheer number of cases, more contested pleas are likely in the absence of a global settlement policy. For contractors who have "locked-in" a finding of present responsibility with DOD by voluntarily disclosing their misdeeds, there is little incentive to plead guilty to charges that the contractor might be able to beat.[61]

DOJ will not want to litigate many of these cases. They are difficult to investigate and prosecute, and may result in a higher acquittal rate. A criminal investigation involving the Sperry Corporation took up the time of a prosecutor, an auditor, and several DOD investigators for a year. The time was needed to examine 32,000 documents and to interview forty people. A government memorandum recommending an overall (global) settlement pointed to the difficulty in disproving expenses, the number of government regulations that applied, the hundreds of boards of contract appeals cases interpreting standards and regulations, and the low corporate level of the program manager as justifying only a corporate plea, a civil and administrative settlement, and no prosecution of individuals. Furthermore, the Air Force agreed on behalf of DOD not to suspend or debar Sperry.[62] In the absence of the global settlement, then, this case does not look like a prosecutorial winner.

Mischarging of costs is still by far the most common source of procurement fraud allegations.[63] All but one of the major mischarging cases filed before mid-1985 were settled prior to trial, however, and therefore judicial acceptance or rejection of the underlying legal contentions of the parties never occurred.[64] Problems may therefore arise in this area as more judges consider such cases more closely. For example, consider the DIVAD case. Almost a year after the indictment of General Dynamics in December 1985 on conspiracy charges, a federal district court judge in California referred the case to the Armed Services Board of Contract Appeals (ASBCA) for clarifications of the terms of the contract. The judge wanted the ASBCA to help him decide whether the contract made the defendant's actions legal, or whether it was so ambiguous that the acts committed could not constitute a crime. He considered defense industry rules "webs of laws, regulations, and directives, that can almost defy understanding."[65] These are hardly words to warm any prosecutor's heart.[66]

The same confusion appears to have prevailed at DOJ. On 22 June 1987, DOJ dropped the DIVAD case against General Dynamics due to a radical change in the government's view of the facts. Assistant Attorney General William F. Weld told a news conference that DOJ had believed that the company had a fixed-price contract with a firm ceiling, but eventually became convinced that the contract only required the company to exert its best efforts to stay within the ceiling, and allowed more flexibility in charging overhead costs than prosecutors originally thought. Mr. Weld also said that the indictment had erroneously assumed that General Dynamics had to deliver a finished weapon. This action by DOJ came several weeks after it had dropped a three-year fraud investigation of General Dynamics' submarine contracts, and stimulated criticism of DOJ's competence by at least two U.S. Senators.[67] These General Dynamics cases may have a lasting effect on the eagerness with which DOJ pursues procurement fraud cases in the future.

General Dynamics probably would not have put up such a stiff fight, however, if it had not already made the deal discussed earlier with DOD.[68] Under the provisions of that agreement, suspension and debarment would apparently

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[58] Inside the Pentagon No. 46, at 8 (Nov. 21, 1986).

[59] Fed. Cont. Rep. (BNA) No. 1, at 16 (Jan. 5, 1987).

[60] Fed. Cont. Rep. (BNA) No. 5, at 212 (Feb. 2, 1987).

[61] Bennett, *supra* note 7, at 39.

[62] Graham, *supra* note 4, at 236.

[63] Kenney & Kirby, *A Management Approach to the Procurement Fraud Problem*, 15 Pub. Cont. L.J. 350 (1985).

[64] Graham, *supra* note 4, at 235.

[65] United States v. General Dynamics Corp., 644 F. Supp. 1497, 1504 (C.D. Cal. 1986), *rev'd*, 828 F.2d 1356 (9th Cir. 1987).

[66] The ASBCA refused to address many of the policy-related issues raised by the judge, and the Ninth Circuit held that the judge improperly referred the case to the ASBCA. United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987).

[67] *General Dynamics Dismissal Tied to Document Discovery*, Wash. Post, June 23, 1987, at A1.

[68] *See supra* text accompanying note 53.

not have been invoked for the original or any future indictments for related misconduct where the underlying problem had already been corrected by the settlement with DOD. Therefore, even if it had committed some fraud, General Dynamics could have hoped to fight its way through to an eventual acquittal on the existing charges.

One procurement attorney has identified six potential factors that give contractors an excellent chance for acquittal in any criminal prosecution for procurement fraud.[69] The factors include: (1) the presence of complex technical cost accounting issues beyond the sophistication of most jurors; (2) the ability of the contractor to show that the government contributed to the creation of the problem giving rise to the dispute; (3) the possibility that the conduct underlying the criminal charges is merely "stupid" or negligent rather than criminal; (4) the conduct may not have involved any intent to defraud or deceive the government; (5) the government may not be able to show an economic loss or other concrete injury; and (6) almost invariably, the conduct will have taken place at a lower management level without apparent knowledge or participation of officers or senior management, and contrary to corporate policy.

An example of the second factor can be seen in the DIVAD saga. Shortly after General Dynamics was indicted, Army Undersecretary James Ambrose sent a handwritten memo to Army research, development, and acquisition head Jay Sculley. Mr. Ambrose had been vice-president at Ford Aerospace when it was alleged to have mischarged funds. The memo warned that the government may be "part of the problem by encouraging, or even demanding" that contractors mischarge contract costs as Independent Research and Development costs. This was the same type of misconduct of which General Dynamics was accused.[70] Industry lawyers say that similar use of Independent Research and Development accounts by contractors is widespread.[71]

Ultimately, tackling a large number of contested, extremely complicated cases may be too much for DOJ, considering its chronic understaffing and past dependence on guilty pleas to move its caseload.[72] Fortunately for DOJ, the 5 February 1987 letter from Deputy Attorney General Arnold I. Burns to Mr. Taft indicates that DOJ may be coming around to this conclusion.[73] While not mentioning the possibility of global settlements, Mr. Burns stated that "it is important that the Defense Department coordinate closely with the Justice Department in administering its voluntary disclosure program." The letter stated that the Defense Procurement Fraud Unit in the Criminal Division of DOJ would continue as the contact point to review all voluntary disclosure issues for DOJ.[74]

Recommendations

DOD should negotiate a Memorandum of Understanding (MOU) with DOJ to ensure greater cooperation in procurement fraud cases. The MOU should set strict time limits within which each agency may achieve a settlement with the contractor after the close of an investigation, with final agreements coordinated between the DOD department involved and DOJ's Defense Procurement Fraud Unit. The strict time limits should satisfy most DOJ objections to global settlements.

Furthermore, in the case of voluntary disclosure, the DOD department should not find present responsibility and "waive" debarment and suspension without giving DOJ a reasonable time to decide whether to conclude a plea agreement with the contractor. The contractor's willingness to admit its guilt in some form should be a factor to be considered in the present responsibility determination by debarment and suspension authorities.

Finally, DOD should cooperate with DOJ to ensure that those contractors "caught in the act" will fare poorly in a global settlement. DOD should make sure that such contractors pay dearly in reimbursements, and in civil and criminal fines. As Mr. Burns said in his letter, when prosecuting defense contractors, "deterrence is a most significant factor."[75] DOD has to make voluntary disclosure the only worthwhile alternative.

Conclusion

A stronger voluntary disclosure program is needed. DOD cannot catch enough of the firms committing contract fraud with its foreseeable enforcement effort, even though the fraud caseload will expand in response to the new anti-fraud laws. As one consequence of a greater caseload, the use of global settlements should continue to increase.

Contractors, whether voluntarily disclosing or "caught in the act," will seek agreements with DOD and DOJ to limit the damage. If "caught in the act," they will probably seek a global settlement in which they pay large sums to reimburse the government for any losses or costs of investigation to avoid indictment and suspension or debarment. These contractors will normally want to achieve a global settlement so that they are only "hit" once, rather than making independent agreements with DOD and DOJ that may both turn out to be harsh in their terms.[76] Of course, as long as global settlements are unofficially disapproved, the "nonvolunteer" will attempt to secure its flanks with an agreement concerning suspension and debarment with DOD before dealing with DOJ. In cases of those who voluntarily disclose, they will probably seek separate settlements—with DOD first and DOJ last. The government

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[69] Bennett, *supra* note 7, at 39.

[70] Inside the Pentagon No. 47, at 4 (Nov. 28, 1986).

[71] *Id.* at 3.

[72] Bennett, *supra* note 7, at 39.

[73] Fed. Cont. Rep. (BNA) No. 8, at 304–05 (Feb. 23, 1987).

[74] *Id.* at 304.

[75] *Id.*

[76] A good example of this was Martin Marietta's recent settlement in which the corporation pled guilty to an information instead of an indictment (to avoid suspension) and paid the government up to $4,000,000. *Martin Marietta Corp. Admits Defrauding U.S. on Rebates,* Wash. Post, Feb. 18, 1987, at A1.

would be better off in either case with a well-coordinated global settlement.

DOD will continue to push the voluntary disclosure program and will be more willing to make global settlements. As money becomes more of a rare commodity, voluntary disclosure repayments and global settlement reimbursements will provide significant sums to the federal government and moral support for the DOD budget in the eyes of the public. DOD's ability to accomplish these goals will be significantly increased by a policy of closely coordinating remedies and settlements with DOJ.

DOJ will find that the fear of debarment or suspension is still an awesome weapon to have in its prosecutorial armory. Without it, DOJ will find itself confronted with an ever-increasing number of complicated contested cases.

The interests of DOD and DOJ in playing on the contractor's fear of the other department should lead to an increasing linkage between DOD and DOJ settlements. The contractor's desire to resolve these disputes quickly will ultimately result in global settlement negotiations.

On the other hand, in an era of voluntary disclosure, the separate, anti-global settlement stance taken by DOJ and DOD will only help the fraudulent contractor. The contractor will be able to negotiate an agreement with DOD that secures it against debarment or suspension before it turns on DOJ in a fighting mood. DOD and DOJ need to work more closely together to ensure that the voluntary disclosure program works, and should use global settlements to ensure that the contractor does not "divide and conquer."

Inevitable Discovery: An Overview

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Introduction

In *Nix v. Williams,*[1] the United States Supreme Court approved, as a matter of constitutional law, the doctrine of inevitable discovery. This doctrine permits the introduction of direct and derivative evidence in criminal trials in spite of police misconduct that would normally trigger the fourth amendment exclusionary rule.

This decision reflects the shift that has occurred in the application of the exclusionary rule to admissibility of evidence in criminal trials. The Supreme Court, concerned with what it has termed the drastic social cost of the rule, has sought to confine its operation to the core rationale, *i.e.*, deterrence of unlawful police conduct.[2] This concern has been a recurring theme in Supreme Court decisions.[3] The Court appears committed to a course that seeks to fine-tune the operation of the exclusionary rule so as to protect important constitutional values as well as the truth-seeking process in criminal trials.

This article will explore the evolution of inevitable discovery from its genesis in *Silverthorne Lumber Co. v. United States*[4] and *Wong Sun v. United States*[5] to the present. In so doing, the author has attempted to categorize fact patterns that have supported application of the doctrine. After reviewing federal and state cases, the article examines the application of the doctrine in the military. The reader should realize that this area of the law is in a state of flux, and further research is required.

The exclusionary rule made its first appearance in *Weeks v. United States*[6] and was applied to direct evidence: the contraband forming the basis of the charge. In *Silverthorne Lumber Co. v. United States,* the Supreme Court extended application of the exclusionary rule to derivative evidence: evidence derived from exploitation of primary evidence that had been illegally obtained. In Justice Holmes' view, allowing the government to use the knowledge so acquired would "[reduce] the Fourth Amendment to a form of words."[7] Holmes carefully added a caveat to this new prohibition when he observed that evidence so obtained is not "sacred and inaccessible" if knowledge is "gained from an independent source."[8] The *Silverthorne* extension was followed in *Wong Sun v. United States.*[9] The Court, while forbidding admission of evidence directly related to illegal police conduct, again observed that not all evidence is "fruit of the poisonous tree." Rather, the more apt question is whether, granting establishment of the primary illegality, the evidence to which objection has been made was obtained by exploitation of the primary illegality, or instead by means sufficiently distinguishable so as to be purged of the primary taint.[10] From a historical standpoint, the stage

*The author is a circuit judge for the Nineteenth Judicial Circuit of Florida. (1984).

[1] 467 U.S. 431 (1984).

[2] *Id.* at 432.

[3] *See generally* United States v. Leon, 468 U.S. 897 (1984); Rakas v. Illinois, 439 U.S. 128 (1978).

[4] 251 U.S. 385 (1920).

[5] 371 U.S. 471 (1963).

[6] 222 U.S. 383 (1914).

[7] 251 U.S. at 392.

[8] *Id.*

[9] 371 U.S. 471 (1963).

[10] *Id.* at 487–88.

was set for the fullblown development of the inevitable discovery doctrine.

The Parallel Source

In *Wayne v. United States*,[11] the police in the course of investigating an abortion-induced death learned of the location of the decedent's body from an independent source. Officers then made an illegal warrantless entry into the defendant's residence. In the residence, police located the victim's body and normal forensic procedures followed. At trial, the defendant, arguing the application of the fruit of the poisonous tree doctrine, sought to exclude evidence derived from the victim's body, including the coroner's testimony about the condition of the body and the cause of death. In rejecting the defense argument, Chief Justice (then Judge) Warren Burger, after discussing *Silverthorne* and *Wong Sun*, found "the necessary causal relation between the illegal activity of the police and the evidence sought to be excluded was lacking."[12] In reaching this conclusion, Judge Burger first observed that the victim's sister had informed police of the state of affairs prior to their entry. Secondly, in the Court's view, it was inevitable

> that even had the police not entered appellant's apartment at the time and in the manner they did, the Coroner sooner or later would have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post-mortem examination prescribed by law.[13]

State v. Miller[14] is illustrative of the *Wayne* approach to the question of inevitable discovery. The defendant, convicted of manslaughter in the first degree, appealed denial of a motion to suppress evidence gained in a warrantless search of his motel room. The search, conducted by law enforcement officers, revealed the body of the victim and the identity of the defendant as the occupant of the room.

In affirming the trial court's denial of a motion to suppress the evidence, the Oregon Court of Appeals explicitly adopted the findings of fact and conclusions of law arrived at by the trial court. In those findings and conclusions, the trial court viewed discovery as inevitable and independent of any illegal police action. This conclusion was based on evidence that a maid, in the normal course of hotel routine, would have entered the room where the body was located.[15] This in turn would have inevitably led to discovery of the victim's body and the other evidence sought to be suppressed.

As in *Wayne*, the inquiry was centered on information furnished by a non-law enforcement source. If that information is sufficient in and of itself to set law enforcement machinery in motion toward its inevitable result, then the violation may be disregarded.[16]

Parallel Exceptions to the Warrant Requirement

In *People v. Fitzpatrick*,[17] the defendant appealed his conviction for first degree murder of a New York State Police officer. As one ground for reversal, he alleged that the murder weapon was improperly admitted in evidence. The basis for this argument was that the weapon was the fruit of an involuntary statement obtained by law enforcement officers at the scene of his arrest. Fitzpatrick was arrested at his home, hiding in a closet on the second floor. The officers removed Fitzpatrick from the closet, moved him a few feet from the closet, and obtained an admission that the weapon was in the closet where he was apprehended. The trial court suppressed, on *Miranda*[18] grounds, the verbal admission, but admitted the weapon as not being the "fruit of the poisonous tree." In affirming the conviction, the New York Court of Appeals cited *Silverthorne* and *Wong Sun* and held that "evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence."[19] The court then noted that the interrogation was conducted at the scene and police delayed the search of the closet for that purpose only. In the court's view, a legally proper search of the closet was "inevitable," due to the nature of the offense giving rise to the valid arrest. Thus, the evidence was not obtained as a result of the unlawful act of interrogation but, in a constitutional sense, was the result of a lawful search incident to arrest.

In *Owens v. Twomey*,[20] the defendant sought collateral review of his state conviction for rape, aggravated kidnaping, and armed robbery. In urging reversal, the defendant argued for exclusion of the victim's in-court identification. The identification, in the defendant's view, was derived from an illegal search of his residence. The defendant further argued that fingerprint comparisons were also derived from the illegal search of his residence.

The defendant had kidnaped a fourteen-year-old girl from her home. Shortly thereafter, the defendant kidnaped a second person, Govia. The defendant then left the area with both Govia and the girl in Govia's car. During the course of the next several hours, he repeatedly raped the girl and threatened both victims with death. The defendant finally took the two to his residence, where they escaped.

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[11] 318 F.2d 205 (D.C. Cir. 1963).

[12] *Id.* at 209.

[13] *Id.*

[14] 67 Or. App. 637, 680 P.2d 676 (1984).

[15] 680 P.2d at 682.

[16] *See also* Commonwealth v. White, 365 Mass. 312, 311 N.E.2d 550 (1974) (maid would normally be expected to come forward and cooperate with police authorities); People v. Soto, 55 Misc. 2d 219, 285 N.Y.S. 166 (1967) (confession inadmissable but weapon would have been found by postman and turned over to police).

[17] 32 N.Y.2d 499, 300 N.E.2d 139 (1973).

[18] Miranda v. Arizona, 384 U.S. 436 (1966).

[19] 300 N.E.2d at 141.

[20] 508 F.2d 858 (7th Cir. 1974).

The police, based on the information from the victims, located the residence and conducted an illegal search of the apartment. This search led to the defendant's girlfriend who disclosed the defendant's identity. He was then arrested and a fingerprint exemplar was matched to a latent print recovered from Govia's auto. In affirming his conviction, the Seventh Circuit found that the inevitable discovery doctrine applied to both his identification and the location and identification of his girlfriend.

The investigation, absent any constitutional violations, would, in the court's view, have revealed his identity and furnished probable cause for his arrest. A proper arrest would have resulted in his fingerprints being taken and in their comparison with the latent prints obtained from the victim's auto. Thus, the admittedly illegal warrantless search was dissipated by the lawful arrest based on probable cause and, therefore, admission of the composite fingerprint evidence was proper.[21]

In *United States v. Romero*,[22] federal officers received an anonymous tip that a large amount of marijuana was located at the home of one Sena. They reported this information to local police officers, who conducted a surveillance of the residence. The officers observed Romero, accompanied by a suspected drug dealer, carrying grocery sacks from the home to a van. The van left the scene and was stopped approximately one mile away by other officers. At the scene of the stop, two officers conducted a pat down of the defendants and discovered marijuana. A third officer, at the same time, opened the driver's side of the van and detected a strong odor of marijuana. Officers then obtained search warrants for both the residence and the van. Several pounds of marijuana were found at both locations. In affirming the defendants' conviction, the court initially approved the warrantless stop of the van.

The court went on to disapprove the search of Romero as being in excess of the limited pat-down permitted by the stop and frisk powers. The court then approved, again on a stop and frisk rationale, the opening of the van door and the discovery of the pungent odor. Thus, as in *Fitzpatrick*, the evidence in question would have been inevitably discovered in spite of the pat-down. The odor of marijuana, in the court's view, was obtained lawfully and provided a basis for Romero's arrest. The evidence on Romero's person would inevitably have been discovered in a search incident to the arrest.[23]

The rationale of these cases appears to be that, even if unlawful police activity is present, the exclusionary rule will not be applied if a second and lawful procedure leading to the same result is present in a given factual setting.

Parallel Investigations

Given the multiplicity of law enforcement authorities, some citizens often find themselves aggressively pursued by more than one law enforcement agency at a time. In such a situation, several agencies may seek to use evidence obtained during parallel investigations. What is the effect of one agency's faux pas on a parallel investigation? The following cases provide a framework for answering this question.

United States v. Schmidt[24] involved a smuggling operation that had its inception in Peru. The defendant was apprehended by agents of the Peruvian Naval Intelligence when he surfaced in a restricted area of Cullalo harbor in Lima. The defendant, prior to his apprehension, had been scuba diving under the hull of a ship, the *Santa Mercedes*, and attached a canister of cocaine to the hull. The Peruvian authorities obtained incriminating evidence both at the scene of his arrest and during a search of his apartment. After his arrest, Peruvian authorities subjected Schmidt to what was described euphemistically as "abusive interrogations." During a two-week period, the defendant was subjected to beatings, non-stop interrogations, and finally repeated dunkings. Eventually he confessed to officials of the Peruvian Investigative Police.[25] At the same time, U.S. Drug Enforcement Agency (DEA) agents interviewed Schmidt and obtained statements from him that were found to be voluntary. The multiple confessions given to Peruvian authorities were, not surprisingly, suppressed. Schmidt also objected at trial to admission of all physical evidence on *Wong Sun* grounds, arguing that the items were obtained by exploitation of the coerced statements.[26]

In upholding admission of the evidence, the Court of Appeals for the Tenth Circuit found initially that evidence obtained at the scene and at his apartment by Peruvian authorities was admissible and not related to the subsequent police misconduct. The reviewing court also upheld admission of his statements to the DEA agents.[27]

The court went on to hold that, even if the cocaine found on the hull was the product of coerced statements, it was still admissible. The court observed that the police in both countries suspected smuggling, drug trafficking, or sabotage, and knew the defendant had been seen diving directly beneath the *Santa Mercedes*. Finally, because the *Santa Mercedes* had left before a search of the hull was made, independent investigative procedures underway would "almost certainly" have led to discovery of the contraband when the ship arrived in the United States.[28] This would have occurred, in this court's view, inevitably, and independent of any coerced statements.

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[21] *Id.* at 866, 877.

[22] 692 F.2d 699 (10th Cir. 1982).

[23] *Id.* at 703.

[24] 573 F.2d 1057 (10th Cir. 1978).

[25] *Id.* at 1059–60.

[26] *Id.* at 1065.

[27] *Id.* at 1064.

[28] *Id.* at 1065.

United States v. Fisher[29] presents a less complicated fact pattern. The New York State Police were conducting an investigation into the murder of a state police officer. The weapon used in the shooting was traced to the defendant, who admitted purchasing the weapon while using the name "Ashe." The information was forwarded to a federal agent, who began an independent federal investigation based on a weapons charge that was totally unrelated to the ongoing criminal investigation. Based on the information linking the weapon to the accused, as well as the statement obtained by the state authorities, the investigation continued and culminated in the defendant's conviction for federal firearms violations.

On appeal, Fisher contended that the statement obtained by the state authorities was involuntary and all subsequent evidence obtained by federal authorities was therefore fruit of the poisonous tree. In rejecting his contention, the Court of Appeals for the Second Circuit found that, even if the statements to state authorities were involuntary, the evidence was still admissible. The court based this conclusion on the testimony of the federal agents, who testified that the information obtained in the unrelated arrest of the defendant would have triggered the second investigation without regard to the statement obtained by state officers.[30] In the court's view, the second investigation would have inevitably uncovered the same evidence. Thus, any possible *Miranda* violation in the state investigation was irrelevant and did not preclude admission of evidence obtained in the federal investigation.

Routine Procedures

All persons subjected to the vagaries of governmental machinery know that the bureaucratic engine possess a life and direction of its own. This universal law is present in all law enforcement agencies and is known in those agencies as "routine procedures." The following cases provide factual situations where these procedures resulted in admission of evidence in spite of police misconduct.

In *United State v. Seohnlein,*[31] the defendant and his accomplice fled to St. Louis after relieving a Baltimore Bank of its deposits through the use of armed self-help. Their new-found prosperity not surprisingly aroused the suspicions of local authorities. They learned that Seohnlein, who was using the alias "Henry," was driving on an invalid license. He was arrested on that charge and a search of his wallet revealed identification in the name of Seohnlein. The police then made FBI inquiries concerning Seohnlein and Rutkowski, the co-defendant. The FBI notified St. Louis authorities that both were fugitives and that warrants had been issued for the Baltimore bank robbery. The police arrested Rutkowski and Seohnlein and confiscated currency in their possession. The trial court excluded the papers found in Seohnlein's wallet and an exculpatory statement made to St. Louis police. The court, however, admitted the currency and a statement made by Seohnlein after police learned of the warrants. In affirming the trial court, the Fourth Circuit found that police would have arrested Seohnlein even if the papers had not been discovered in his wallet. This conclusion was based on information supplied by Rutkowski that would have triggered the FBI inquiry that identified the defendant. Thus, in the court's view, the wallet search only accelerated the inevitable lawful arrest that led to the currency and statements.[32]

United States v. Brookins[33] provides another example of this approach. Brookins was charged with and convicted of receiving and concealing a stolen vehicle after extensive investigations by state and federal authorities. At trial, the district court excluded a statement given to local police by Brookins and a purported consent search, on the grounds that both were involuntary. The court admitted, however, testimony of a witness, M.D. Holt, over Brookins' contention that his identity was only learned as a result of the illegal interrogation and search.

In rejecting Brookins contentions, the Fifth Circuit examined the investigations in toto and found that "leads possessed and being actively pursued prior to the illegal conduct made discovery of Holt a reasonable probability."[34] These leads, it should be re-emphasized, were totally independent of the illegal conduct and were obtained in a lawful manner.

In *United States v. Bievenue,*[35] the defendant, a police officer, was convicted of conspiracy to import cocaine. At trial, he sought to suppress records obtained from travel agencies concerning his trips to Columbia prior to his arrest. He contended that the records were obtained only as a result of an earlier illegal search of his residence that revealed ticket stubs from various travel agencies. The government answered that while the search of his residence was illegal, the records would have been "inevitably discovered."[36] In accepting the government's argument, the court examined the total investigation conducted and found that prior to the illegal search, the police were aware of the defendant's and his wife's travels to Colombia and in possession of customs declarations for those trips. This information, in the court's view, would have been sufficient to cause the government "to canvas all the travel agencies during the routine investigation."[37] Thus, "the scope of this investigation lends credence to the Government's contention that the travel agency records would have been inevitably discovered during routine police investigation."[38]

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[29] 700 F.2d 780 (2nd Cir. 1983).

[30] *Id.* at 782–84.

[31] 423 F.2d 1051 (4th Cir. 1970).

[32] *Id.* at 1053.

[33] 614 F.2d 1037 (5th Cir. 1980).

[34] *Id. at* 1042.

[35] 632 F.2d 910 (1st Cir. 1980).

[36] *Id.* at 913.

[37] *Id.* at 914.

[38] *Id.*

Massive Investigations

Certain cases for one reason or another produce a full retaliatory response from law enforcement agencies. In these situations, law enforcement agencies disregard scarce agency resources and concentrate on one particular investigation. Constitutional violations in such investigations have been obviated by a court determination that law enforcement would have inevitably discovered the evidence due to the massive and systematic nature of the investigation.

In *Government of the Virgin Islands v. Gereau,*[39] a terrorist group invaded a resort on the island of St. Croix in the Virgin Islands. The defendants robbed the resort's guests and employees and killed eight people. In response, federal and island authorities launched a massive and protracted investigation involving local police, the U.S. Marshal's Service, and the Federal Bureau of Investigation. During the investigation, Meral Smith, an eventual defendant to the homocide charges, was arrested. Smith made admissions and revealed the location of one of the murder weapons.

In response to a motion to suppress the statement and weapon, the trial court excluded the statement but admitted the weapon. On appeal, the defense contended that the weapon was "fruit of the poisonous tree" and should also have been excluded. In affirming the trial court's actions, the Third Circuit looked to "the massive investigation underway to find the killers."[40] In the court's view, the circumstances extant at the time of Smith's arrest would have led inevitably to discovery of the weapon even without the improperly obtained statement.

Persuasive to the court was the presence of a large number of officers at the scene of the defendant's arrest. In addition, evidence clearly indicated that, prior to his arrest and interrogation, officers at the scene, "called to Smith and ordered him out of the residence at 160 Estate Grove Place, a window opened at the rear of the house, a noise was heard that might have been metal or stone striking a rooftop, the window shut and a few moments later, Smith exited through a front window."[41] In the court's view, those factors alone would have led to the weapon, "without utilization of the statement."[42]

As indicated, the United States Supreme Court formally approved inevitable discovery in the case of *Nix v. Williams* (referred to as *Williams II*).[43] This celebrated case involving the brutal murder of a ten-year-old girl was the subject of two state prosecutions. Williams' first conviction was reversed because his right to counsel was violated; Williams told the police where to find the girl's body after the now-famous "Christian Burial" speech.[44] The language of the opinion, however, clearly indicated that the inevitable discovery doctrine may permit introduction of evidence associated with the victim's body.

In Williams' second trial, the state did not offer Williams' statement, but did introduce derivative evidence on an inevitable discovery rationale. The evidence consisted of autopsy results and clothing obtained when the child's body was found after the defendant's statement. The defense contended that this evidence was improperly admitted because it was tainted by the illegal interrogation.

In *Williams II,* the Supreme Court once again expressed its desire to restrict the exclusionary rule to a deterrence rationale. This analytical format recognized the necessity for deterrence of unlawful police conduct: "[t]he core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."[45] This is necessary in order to ensure that the prosecution does not profit from illegality.

If, on the other hand, evidence would have been discovered "by means wholly independent of any constitutional violation"[46] suppression is not warranted. In the Court's view,

> [t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred.[47]

Within this framework, the Court found inevitable discovery "functionally similar" to the independent source doctrine. Thus, the core rationale of the independent source doctrine is "wholly consistent with . . . our adoption of the ultimate or inevitable discovery exception to the Exclusionary Rule."[48]

It should also be noted that application of the doctrine is proper even absent a predicate of good faith. To secure admission of inevitably discovered evidence, the government need only demonstrate by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means. To require otherwise would, in the Court's view, "place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity."[49] Viewed in this context, there is no rational basis

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[39] 502 F.2d 914 (3rd Cir. 1971).

[40] *Id.* at 927.

[41] *Id.*

[42] *Id.* at 928.

[43] 467 U.S. 431 (1984).

[44] Brewer v. Williams, 430 U.S. 387 (1977).

[45] 467 U.S. at 442–43.

[46] *Id.* at 443.

[47] *Id.*

[48] *Id.* at 444.

[49] *Id.* at 445.

to keep evidence from the jury if the government can prove the evidence would have been lawfully obtained.

Inevitable Discovery Under Military Law

In *United States v. Kozak,*[50] the Court of Military Appeals approved application of inevitable discovery in military practice. What follows is a discussion of the holding in *Kozak* and recent military cases involving application of the doctrine.

In *Kozak,* a reliable informant supplied information to a commander that the accused and one Murphy had a quantity of drugs in a locker in a German train station. Based on the foregoing, the commander instructed a Criminal Investigation Division (CID) agent to "go to the [train station], observe the locker and to attempt to apprehend, Private Kozak and pick up drugs that—if possible, that he was supposed to have received there from that locker."[51] Before the arrival of the accused at the train station, CID agents and German police began searching the lockers. Eleven plates of hashish were found in the third and fourth lockers; all but one were removed by German police. Kozak then arrived, opened the locker, examined its contents, and slammed the door shut. Kozak was then apprehended by CID agents, and a search revealed no contraband on his person. A second examination of the locker revealed one tray of hashish left by German police. The trial court, acting on a defense motion, suppressed the ten plates removed by the Germans, but admitted the plate found in the locker following the accused's apprehension.

Writing for a unanimous court, Judge Cook first held that the apprehension of the accused was based on probable cause. Secondly, the authorization given was "quite specific and reasonable in scope in relation to the information provided to [the commander]."[52] Finally, the court was of the view that the trial court was correct in suppressing the ten plates initially seized in excess of the authorization given by the commander. The precise issue then became the legality of the seizure of the hashish subsequent to the accused's apprehension.

In determining that issue, the court first engaged in an extended discussion of the historical evolution of the exclusionary rule as applied to both direct and derivative evidence obtained in violation of constitutional standards.

The court then turned to a discussion of the logical underpinning of the inevitable discovery rule by observing "the inevitable-discovery theory is closely related to both the attenuation and independent source exceptions except to the extent that it permits the prosecution to prove that the evidence *would* have been discovered through legitimate means in the absence of official misconduct."[53]

Next, the court found that there was "no doubt that the accused would have been arrested when he arrived at the train station and opened the locker."[54] Thus, the hashish would have been inevitably and permissibly discovered as incident to lawful apprehension.

Finally, the court delineated a clear predicate for application of the doctrine. The prosecution must demonstrate by a preponderance of the evidence that "government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred."[55]

The *Kozak* opinion is interesting from at least two standpoints. First, the decision was rendered prior to the Supreme Court's approval of inevitable discovery. The court was clearly on the cutting edge of a major shift in the criminal law. Second, it may portend a shift in analysis by the court with regard to application of the exclusionary rule in military practice. It is at least arguable that the court has accepted, sub silentio, the fine-tuning approach to the exclusionary rule. Such a shift could have major implications for the future direction of military law.

In a later case, *United States v. Lawless,*[56] the doctrine was applied to derivative evidence.

In *Lawless,* Air Force policemen on foot patrol detected the odor of marijuana coming from a residence in an enlisted housing area. The officers summoned assistance and were able to observe both marijuana use and the accused cutting marijuana. The policemen obtained a search authorization and the ensuing search resulted in the seizure of additional contraband. At trial, the military judge ruled that three searches had occurred and that the second and third were unlawful. The defense then sought to exclude the testimony of the two residents of the quarters as being based on exploitation of the illegal searches. The Court of Military Appeals held that the identity of the witnesses was a fact "that could have been readily ascertained by the police officers" and "was not tainted by the *subsequent* police actions."[57]

United States v. Carrubba,[58] decided by the Army Court of Military Review, is a rather straightforward application of the doctrine. Carrubba, a military policeman, while intoxicated, volunteered to two fellow officers that his personal vehicle contained marijuana and a sawed-off shotgun. Carrubba then inexplicably showed the contraband to the officers and locked his trunk. In due course, Carrubba was apprehended and refused a requested consent search. The CID agent then left to obtain a search authorization. Carrubba in response to improper police importunings, then agreed to a search of his vehicle.

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[50] 12 M.J. 389 (C.M.A. 1982).

[51] *Id.* at 390.

[52] *Id.*

[53] *Id.* at 392 n.7.

[54] *Id.* at 393.

[55] *Id.* at 394.

[56] 18 M.J. 255 (C.M.A. 1984).

[57] *Id.* at 257–58 (emphasis added).

[58] 19 M.J. 896 (A.C.M.R. 1985).

The Army court approved the search. It found that the government had established by a preponderance of the evidence that the government possessed sufficient evidence that would have inevitably led to the contraband. The actions of the accused, in the court's view, only hastened the inevitable search that would have occurred pursuant to consent or search authorization.

The Court of Military Appeals revisited this issue in *United States v. Portt.*[59] Portt was convicted of possession, distribution, use, and introduction of marijuana. He appealed, alleging error in the denial of his motion to suppress physical evidence and statements.

Two airmen assigned to clean a security police guardmount room discovered drug paraphernalia in a locker. The locker was unlocked and did not have a name on it. The airmen reported the discovery and a subsequent search of the locker revealed a shot record containing the name of the accused. In affirming the conviction, the court determined that the accused had not exhibited a reasonable expectation of privacy in the locker and that therefore, the search conducted by law enforcement was proper. Additionally, the court indicated that the first search of the locker by airmen cleaning the squad room was private versus law enforcement action. In the court's view, the information obtained from this first examination would have inevitably led to the accused.[60]

Conclusion

The doctrine of inevitable discovery permits the government to introduce direct and derivative evidence even if police misconduct is present in a given case. Admissibility is contingent upon proof that the government would have inevitably discovered the evidence during the course of the investigation. Admission is not contingent upon the subjective good faith of law enforcement officials. The doctrine, at this writing, appears to be gaining full acceptance in criminal trials.

[59] 21 M.J. 333 (C.M.A. 1986).

[60] *Id.* at 355 n.* (citing *Williams II* and *Kozak*).

USALSA Report

United States Army Legal Services Agency

Trial Counsel Forum

Trial Counsel Assistance Program

Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime

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Introduction

Just when commanders thought they had enough to worry about, now they have soldiers with AIDS. Acquired Immune Deficiency Syndrome is a deadly disease that leaves its victims fatally vulnerable to infection and malignancy. The virus responsible for this bleak condition, Human Immunosuppression Virus (HIV),[1] is transmitted through bodily fluids, primarily blood and semen. By testing for the presence of certain antibodies,[2] it is possible to tell whether a person has the HIV virus. Army policy requires all soldiers to be tested for presence of the HIV antibody.

Once identified as positive for the HIV antibody, soldiers are evaluated for retention. If the infected soldier meets existing medical standards, he is retained.[3] He is then assigned duties consistent with his medical condition,[4] given medical care, and extensively counselled. This counseling, along with medical and case history evaluation, makes up the solider's "epidemiological assessment."

[1] HIV was formerly called HTLV-III. This article also refers to HIV as the "AIDS virus." The term "AIDS" will sometimes be used to denote any aspect of HIV infection from mere seropositivity, AIDS-Related Complex, to AIDS itself.

[2] Blood is tested once by the ELISA and once by the Western Blot methods. Collections of current literature and statistics on AIDS can be found in Redfield & Burke, *Shadow on the Land: The Epidemiology of HIV Infection*, Viral Immunology, Spring 1987, at 1, and Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 Hofstra L. Rev. 91 (1985).

[3] HQDA Letter 40-86-1, 1 Feb 86, subject: Policy for Identification, Surveillance, and Disposition of Personnel Infection with Human T-Lymphotrophic Virus Type III (HTLV-III) [hereinafter HQDA Ltr. 40-86-1]. Application of this policy is currently being litigated. *See infra* note 106 and accompanying text.

[4] *Id.*

As part of the epidemiological assessment, the solider is counselled on preventive health measures. Typically, a medical officer or commander informs the soldier that AIDS is fatal, that one way AIDS is transmitted is through sexual acts, and that safety in sex requires condom use or abstinence.

Human nature being what it is, however, some of these soldiers will disregard this counseling. In the cases presently on Army dockets, the typical fact pattern is simple: after being informed of his infection and his potential to infect others,[5] the soldier proceeded to engage in unprotected sexual acts with partners who were unaware of his medical condition. His partners may ultimately die as a result of his acts. The mere possibility of that result is sure to cause an immediate adverse impact on morale, good order, and discipline.[6]

So what is a commander to do? A leader must have tools to protect as well as discipline troops. Because the infected soldier declined to exercise self-restraint in these matters, he became a candidate for physical restraint at the hand of the government. At a minimum, the command wants to stop that soldier's conduct. The command also wants to deter others from similar acts. What is in the commander's "toolbox" that can be used to accomplish this mission?

This article cannot be a treatise on AIDS law: AIDS law, properly speaking, has not yet been made. AIDS is a new phenomenon and AIDS-related crimes are even newer. The Trial Counsel Assistance Program has received many inquiries on AIDS from Army counsel and from counsel in our sister services. This article will survey issues raised in these inquiries and in AIDS-related litigation, After reviewing the constitutional context of these issues, the article will discuss some of the commanders's "tools" found in the Uniform Code of Military Justice.[7] An overview of Department of Defense and Department of the Army policy on AIDS completes the survey.

AIDS-Related Crimes and the Constitution

Some of the first inquiries on AIDS-related courts-martial focused on constitutional issues. At first glance, AIDS-related courts-martial appeared to criminalize otherwise permissible private, consensual sexual relations.[8] Indeed, any effort to stop the spread of AIDS will necessarily include regulation, criminal or otherwise, of private, consensual sexual activity.[9] Does the presence of the HIV virus make such regulation constitutionally permissible?

A constitutional analysis of AID-related sexual regulation is a balancing act. On one side is the government's right to control the spread of disease. This dovetails with the Army's concern for the health and welfare of soldiers. This military concern is critical for humane as well as combat readiness reasons. On the other side of the equation is the individual's privacy and freedom in sexual intimacy. Both interests must be balanced in the context of the military mission.

The government has the right to control the spread of disease.[10] In *Jacobsen v. Massachusetts*,[11] the Supreme Court said that, by way of its police power to protect public health, the state could force people to receive smallpox vaccinations. Other cases looked to the State's right to confine contagious persons.[12] Presently, about half the states have made it a crime *to spread* veneral disease.[13] While it cannot be a crime simply to *have* a certain disease, acts in which disease is a factor can be criminalized.[14] This is true even if the acts are committed incident to private, consensual sexual relations.

Sexual regulation is constitutionally permissible where the government demonstrates a compelling justification for

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[5] This potential is sometimes called "infectivity."

[6] In one case at Fort Sam Houston, Texas, a female soldier's husband found out about her AIDS-related tryst. He first assaulted her with a brick. Then, when a female captain broke up the fight, he got in his car and ran over both of them. The AIDS-infected soldier who had intercourse with the female soldier subsequently pled guilty at a court-martial. *See Soldier Guilty of Concealing AIDS Infection From Partners*, Wash. Post., Dec. 3, 1987, at A20, col. 1.

[7] 10 U.S.C §§ 801–940 (1982 & Supp. III 1985) [hereinafter UCMJ].

[8] Under military law, fornication, *absent aggravating circumstances*, is not a crime. United States v. Hickson, 22 M.J. 146, 150 (C.M.A. 1986); United States v. Berry, 6 C.M.A. 609, 614, 20 C.M.R. 325, 330 (1956); United States v. Wilson, 32 C.M.R. 517 (A.B.R. 1962). In AIDS-related fornication, however, it is not the sexual intercourse that is criminal. It is an act incident to that intercourse—the deposit or transmission of the AIDS virus—that is the criminal wrong. In the same way that marriage is an aggravating circumstance for adultery, and officership is an aggravating circumstance for fraternization, however, the deposit or transmission of HIV could be pled as an aggravating factor.

[9] *Cf.* United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986). The accused, a captain, was convicted of fraternization by having sexual relations with enlisted females. The officer-enlisted relationship was a sufficient aggravating circumstance to criminalize what might otherwise be permissible fornication.

[10] *See, e.g.*, City of Akron V. Akron Center for Reproductive Health, 462 U.S. 416 (1983); United States v. An Article of Drug 394 U.S. 784 (1969); Mintz v. Baldwin, 289 U.S. 346 (1933).

[11] 197 U.S. 11 (1905).

[12] O'Connor v. Donaldson, 422 U.S. 563 (1975) (quoting Lochner v. New York, 198 U.S. 45 (1905)).

[13] A collection of the statutes appears in Alexander, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 Cornell L. Rev. 101, 116 n.95 (1985). The majority of these statutes address only syphillis, gonorrhea, and chancroid. Most make the act a misdemeanor. Florida imposes disease-reporting requirements on individuals who diagnose or treat veneral disease, including AIDS. Violation of the reporting requirement is punishable by up to a $500 fine. Fla. Stat. § 384–25 (1986).

[14] In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held that the eighth amendment barred conviction of a person based merely on his status as a narcotics addict. The Court reasoned that narcotics addiction was "apparently an illness which may be contracted innocently or involuntarily." *Id.* at 667. In *Robinson*, the Court stated that while it could not be a crime "to be mentally ill, a leper, or to be *afflicted* with venereal disease, a State might determine that the general health and welfare requires that victims of these . . . afflictions be dealt with by compulsory treatment, involving quarantine, [involuntary] confinement, or sequestration" and by imposition of *penal sanctions* for *failure to comply with compulsory treatment* [emphasis added]. *Id.* at 665–66. *See* Marshall v. United States, 414 U.S. 417 (1974) (addicts with two prior felony convictions ineligible for rehabilitative commitment in lieu of imprisonment); Powell v. Texas, 392 U.S. 514 (1968) (conviction for public drunkenness was not conviction for appellant's status as an alcoholic): *see also* Bearden v. Georgia, 461 U.S. 660, 668 n.9 (1983) (lack of fault in violating a term of probation, for example by chronic drunken driving, does not bar revocation of probation because the sentence was not imposed for a circumstance beyond probationer's control "but because he committed a crime" (quoting Williams v. Illinois, 399 U.S. 235, 242 (1970))).

intruding behind closed doors.[15] The Supreme Court has recognized an individual's privacy in and freedom to have sexual intimacy, at least in marriage.[16] Even scrutiny of marital sex has occasionally been justified, as in the instance of spousal rape.[17]

Some other examples of constitutionally permissible sexual regulation are laws proscribing adultery, fornication, sodomy and homosexual acts. These laws may have fallen into disuse because of a shift in social mores. They have not, however, been held constitutionally invalid. Indeed, in *Bowers v. Hardwick*,[18] the Supreme Court recently upheld a statute proscribing private, consensual sodomy.[19] In sum, the Court has often found the government's interest in regulating these types of conduct more compelling than the individual's interest in pursuing them.

If the government's interest was compelling in the garden variety sexual regulation, adding AIDS to the social calculus heightens that interest. The potentially fatal result of HIV transmission to the individual, the public health nightmare of an AIDS epidemic, and the poisoning of the blood supply are a few of the concerns that weigh heavily in favor of permitting regulation. In the military, the unique mission forces the ante even higher because of the need to keep the force physically and mentally "fit to fight."[20] In fact, the Army has a long history of regulating certain sexual conduct in the interest of health, welfare, and readiness.[21]

In the circumstance of HIV-positive soldiers, sexual regulation is necessary to promote and protect the Army's health, welfare, and readiness interests. Deterrence, general and specific, is crucial in meeting the AIDS threat. This brings up an interesting inquiry on the subject of medical quarantine. A quick review is in order. First what is medical quarantine? Second, can it be used as a preemptive strike in the war on AIDS?

Medical Quarantine

Quarantine is total physical isolation from healthy people. Historically, it has been a proper method of protecting the public health.[22] Quarantine remained a feature of state police power until the advent of vaccinations and "miracle" antibodies. These drugs made quarantine less and less necessary.[23]

Quarantine must relate *specifically* to the health danger the individual poses to others.[24] AIDS is not like the common cold or mumps or measles. These diseases spread by casual contact or by airborne contagions. AIDS is commonly spread by an affirmative, volitional sexual act of the carrier, not by his mere presence. In AIDS cases, the individual can simply refrain from the dangerous acts. Therefore, quarantine, which is a drastic invasion of a person's liberty, is overbroad.[25]

Some have suggested construing the medical officer's preventive medicine counseling of the AIDS patient as a "partial" quarantine. This derives from the fact that soldiers are told, in effect, to sexually "segregate" themselves from others. Preventive medicine counseling does not result in a "partial" or "constructive" quarantine. Unless a soldier is clearly ordered into medical quarantine, he does not break quarantine if he persists in unprotected sexual activity. Preventive medicine counseling, however, may be a military order. In that case, the soldier could be punished for disobedience under Article 90, UCMJ.

Military Orders

Commanders have attempted to deter the dangerous sexual acts of HIV-positive soldiers by giving them military orders to refrain from those acts. The soldier might be ordered to refrain from "unprotected" sex, or to tell his sexual partners that he has the HIV virus. However styled, the typical order has zeroed in on the soldier's acts that endanger others.

To be lawful, a military order must relate to a military duty. This duty may encompass actions necessary to "safeguard or promote the morale, discipline, and usefulness of members of a command" as well as actions "directly connected with the maintenance of good order in the service."[26] Furthermore, the order must not infringe on the receiver's constitutional rights.[27] As discussed above, the government's compelling interest in protecting society and the military's compelling interest in protecting the force and readiness justify regulating an HIV-positive soldier's

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[15] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[16] *Id.*

[17] *See, e.g.*, Drope v. Missouri, 420 U.S. 162 (1975). For a discussion of state statutes, see *Immunity Limited on Spousal Rape*, Nat'l L.J., Nov. 25, 1985, at 3.

[18] 106 S. Ct. 2841 (1987).

[19] The defendant's act of sodomy was homosexual, but the statutory prohibition was not limited to homosexual acts. *Id.* at 2842 nn. 1–2.

[20] *See, e.g.*, United States v. Kick, 7 M.J. 82 (C.M.A. 1979) (unique needs of the military justifies making simple negligence that results in death a crime); *see also* Parker v. Levy, 417 U.S. 733, 756 (1974). The Supreme Court recognized that military society is different from civilian society, and that it has unique needs to address in formulating its rules.

[21] *See* United States v. Moultak, 24 M.J. 316 (C.M.A. 1987) (Marine captain convicted of fraternization); United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986); United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985) (claiming a right to privacy in sexual relations between cadre members and trainees was "patently fallacious" in light of government's compelling interest in regulating such conduct); *cf.* United States v. Johanns, 20 M.J. 115 (C.M.A. 1985).

[22] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Speaking of quarantine in dicta, the Court said states have the power "to provide for the health of its citizens." *Id.* at 18.

[23] A comprehensive review of quarantine can be found in Parmet, *AIDS and Quarantine: The Renewal of an Archaic Doctrine*, 14 Hofstra L. Rev. 1 (1985).

[24] *But see* Smallwood-El v. Coughlin, 589 F. Supp. 692 (S.D.N.Y. 1984) (person quarantined for refusing to give blood for testing).

[25] *But see Robinson*, 370 U.S. at 665–66. If, however, the accused has committed AIDS-related crimes, pre-trial confinement might be appropriate.

[26] Manual for Courts-Martial, United States 1984, Part IV, para 14c(2)(a)(iii) [hereinafter MCM, 1984]. *Cf.* United States v. Green, 22 M.J. 711 (A.C.M.R. 1986) (commander's authority to regulate is limited only by the Constitution, and act of Congress, or the lawful order of a superior). *Green* sets out an extensive survey of caselaw on orders and regulations.

[27] MCM, 1984, Part IV, para. 14c(2)(a)(iv). *See also Green.*

sexual conduct. Therefore, such an order has a valid, articulable military nexus.

The negative effect of AIDS-related sexual relations can readily be seen. Even more so than sexual fraternization, AIDS-related sexual acts are provoking, demoralizing, and debilitating. The sexual acts of HIV-carriers can spread AIDS. AIDS is incurable and fatal. As for a military nexus, commanders will not have a difficult time articulating the problems caused by a soldier who knowingly puts others at risk of death or grave physical harm.

An order to refrain from dangerous sex, if obeyed, safeguards others' health, morale, and usefulness. Such an order is a clear statement of the command's efforts to protect all soldiers and their families. It provides a degree of deterrence. It is clearly proscriptive and enforceable, and it is a basis for prosecution.[28] It is a clean and familiar charge in a sea of legal uncertainty. It is also a charge that some people find too narrow; their perspective is that punishing a soldier for disobeying such an order fails to address the *gravamen* of the conduct. Such conduct is much more than flaunting authority, the essence of an Article 90 violation. A soldier who knowingly persists in putting others at risk of contracting a fatal disease flaunts death itself.

Substantive Crimes

What if no order was given? Even if the soldier's conduct was disobedient, what if the command wants to address the substance of what is legally wrong with knowingly spreading or attempting to spread HIV?

Charging AIDS-related misconduct has been a topic of lively debate. As with all cases, AIDS-related courts-martial are fact-specific. AIDS factors might be pled as aggravation of a crime such as sodomy or adultery. Consider these facts as an example. A soldier tests positive for HIV. He is counseled on the effects of HIV on him and on others. He is told that HIV is transmitted sexually, among other ways. He is counselled not to have unprotected sexual relations. Thereafter, he has unprotected sexual intercourse with a consenting woman. What crime or crimes has the soldier committed?

The soldier, now accused, has committed an act of private, consensual, nondeviate, unprotected, and unwarned heterosexual sexual intercourse. He has not made a confession, nor has he made any admissions. This fact situation will be the basis of analysis under Articles 118 (murder), 119 (manslaughter), 120 (rape), 128 (assault) and 134 (the general article). Argument will be advanced on how a particular element of proof might operate in the AIDS-related court-martial. As with all pioneers, lawyers dealing with AIDS-related misconduct cannot afford to be without their imagination. It is time for the "living law" to live a bit and counsel must lead the way.

Article 118 (Murder)

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;
(2) intends to kill or inflict great bodily harm;
(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder. . . .[29]

Murder may be charged only when the victim is dead. AIDS kills slowly. In the usual case, then, the victim will be alive at the time of trial. Therefore, this discussion will be limited to the charge of attempted murder.

In talking to people and reading the popular press, a common response to our fact pattern is that the accused's acts amounted to attempted murder. Under Article 118, there are three types of attempts:[30] if the accused had a premeditated design to kill; if the accused intended to kill or inflict greatly bodily harm; and if the offense occurred during the commission of an enumerated felony. Do any of these describe the accused's conduct?

Attempted Murder: Premeditated

Consider the evidence needed to prove this charge. The government must show that the accused knew that he carried the HIV virus, knew that HIV was transmitted through sexual acts, and knew that HIV posed a deadly threat to any person who received it. Then the government must prove that the accused formed an intent to have sexual relations with a certain person *for the purpose of transmitting the deadly disease to that person.* Finally, the government would have to prove an overt act sufficient to constitute an attempted transmission.[31]

Except for a statement of the accused, it is hard to imagine having evidence of such intent.[32] This evidence would be quite different from traditional indicia of premeditation. Traditionally, premeditation might be shown where the accused obtained a weapon, wore a mask, or lay in wait for

[28] For the reasons cited in this paragraph of text, commanders should order an HIV-positive soldier to comply with specified preventive medicine procedures. Legal advisors should assist commanders in formulating such orders. In some commands where this is routine, commanders use a written order. The soldier acknowledges the order and his understanding of it by his signature. An order, however, is not necessary to make the act wrongful anymore than an order to refrain from unlawful killing is necessary to make that act murder. The order may make unsafe sex an act of *disobedience*, but unsafe sex also may be wrongful under other provisions of the UCMJ.

[29] UCMJ art. 118.

[30] MCM, 1984, Part IV, para. 43d(3). *See also* United States v. Roa, 12 M.J. 210 (C.M.A. 1982). The "inherently dangerous" and evincing "a wanton disregard for human life" language seems to describe our accused's act of unprotected sexual intercourse. These types of acts, however, are not susceptible to attempts. Rather, the accused *completed* an act that was inherently dangerous and in wanton disregard of human life. He cannot be guilty under this Article, however, because one element of the crime is the actual death of the victim.

[31] The overt act could be attempted intercourse or consummated intercourse where the virus was not actually transmitted to the victim. *See* United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (discussion of overt acts constituting an attempt).

[32] What sort of statement would suffice? In Fresno, California, police arrested a prostitute for continuing to practice prostitution after being informed that she had AIDS. When asked why she continued to prostitute when she could infect others, she said, "So what." Prosecutors dropped charges of attempted murder, saying they could not prove intent to kill. L.A. Times, July 13, 1987, part I, at 2, col. 6; *See infra* text accompanying notes 50–51.

his victim,[33] or by the force or nature of the assault.[34] These acts "speak" for themselves. The acts of our accused, on the other hand, do not "speak" of more than sex and the desire for sex. Unless the accused stated otherwise, it is not likely the desire and plan to have sex will be evidence of a desire and plan to kill.

Attempted Murder: Act with the Intent to Kill or to Inflict Grievous Bodily Harm

What about charging attempted murder by doing an act with the intent to kill or to inflict grievous bodily harm? The intent to kill element, as opposed to the design to kill element, paints a picture of a more opportunistic crime. The accused did not really plan to do the murderous act, but when he was doing it, he knew he was doing it and he knew and intended its killing or harmful effect. From evidence of his purposeful act alone, the Manual specifically allows the inference that he intended the natural and probable consequences of his act.[35]

Under our facts, the purposeful act was sexual intercourse. A *natural* consequence of that intercourse was the deposit or transmission of HIV.[36] The transmission of HIV results in death or great bodily harm.[37] To infer that the accused's intent was to kill or to inflict great bodily harm, that result must also be *probable*. Is it probable that the virus will be transmitted to the victim? If the virus is transmitted, it is probable that the victim will die or be greatly harmed by it?

The body of scientific knowledge about AIDS is changing all the time. The disease has been tracked for only a few years. Experts vary on what they believe is the statistical probability that HIV will be transmitted to another during any one sexual encounter.[38] Experts also vary on what they believe is the statistical probability that a person who has the HIV will go on to develop AIDS.[39] It seems fair to say, however, that experts agree that unprotected sex with an HIV-infected person puts the partner at significant risk. Only the courts can tell us whether a "significant risk" is equatable with "a natural and probable consequence of the act purposefully done."

"Significance" is a term of art in the science of statistics and mathematical probability. At law, significance and probability must have other meanings as well. The significance of the risk of HIV transmission must also be viewed in human terms. Likewise, probability at law is not a strict matter of numbers. It is not just a matter of "one in so-many-chances" that the harm will happen.[40] Probability at law also considers at what point a reasonable person is on notice that his conduct could have certain consequences.[41] It also calculates at what point, considering the harm involved, conduct should be culpable.[42]

From the perspective of the individual as well as society, the harm that is risked by unprotected sexual intercourse is grievous indeed. In determining whether HIV transmission is a natural and probable consequence of the accused's act, the weight given the statistical probability of transmission should be balanced by the weight given the nature of the harm that could result, the fact that the accused is on specific notice of the possible harm, and the standard at which culpability for such grave risk of harm is appropriate.

If transmission of the virus and development of disease resulting in death or great bodily harm is natural and probable, there is a permissible inference that the accused intended that result. Without other evidence, this inference would be the basis of prosecution for attempted murder by doing an act with the intent to kill or to inflict grievous bodily harm.

Attempted Murder: During the Commission of an Enumerated Offense

A third type of attempted murder should be mentioned. This type would have to occur during "the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson."[43] Trial counsel would not have to

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[33] United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

[34] United States v. Redmond, 21 M.J. 319 (C.M.A. 1986) (premeditation can be inferred from the ferocious nature of the attack); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (intent inferred from 53 stab wounds).

[35] MCM, 1984, para. 43d(3)(a).

[36] "Transmission" indicates that the virus passed through the vagina and established itself in the victim's blood stream. "Deposit" indicates that the virus was placed in the vagina, a place where transmission could occur. Note that when the accused deposits the virus, he puts in motion a "means" or "force" over which he has no control. As to the particular act of unprotected sexual intercourse, he cannot do any further act to cause or prevent transmission of the virus.

[37] *See infra* text accompanying notes 59–61.

[38] *See* Robinson, *supra* note 2.

[39] *Id.*

[40] *See, e.g.*, United States v. Piatt, 17 M.J. 442 (C.M.A. 1984). In *Piatt*, the following instruction was cited in a concurring opinion: intentional "means the doing of an act knowingly and purposefully, intending the natural and probable consequences *which the common experience of mankind* would expect to flow from the act." *Id.* at 447 n.* (Cook, J., concurring) (emphasis added). In United States v. Henderson, 23 M.J. 77 (C.M.A. 1986), Judge Everett looked to the visibility of the cocaine-related deaths of sports figures as a factor in the common experience of mankind. *Id.* at 83 (Everett, C.J., dissenting). AIDS-related deaths are equally visible. *See also United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985).

[41] Remember that the accused *knows* he can transmit a deadly disease. He cannot control or predict if transmission will occur. If harm does not result, that is a fortuity, not a defense. *See* United States v. Martinson, 21 C.M.A. 109, Ill 44 C.M.R. 163, 165 (1971) ("probability that any actual damage would result from the [appellant throwing objects into the intake duct of an engine] is irrelevant, where . . . the appellant seeks to rely on [something] he neither initiated nor controlled to avoid the [damaging] effect"); United States v. Schroder, 47 C.M.R. 430, 435 (A.C.M.R. 1973) (by throwing CS grenade into a hootch, appellant "set in motion an agency which could have resulted in the death or serious bodily injury of the victim, and except for the intervening cause, . . . that result could have been obtained").

[42] *See* United States v. Russell, 3 C.M.A. 696, 14 C.M.R. 114 (1954) (accident and death is a natural and probable consequence of operating a vehicle while intoxicated); United States v. Wooten, 3 C.M.R. 9 (C.M.A. 1952) (in determining extent of liability as a principal, sale of stolen goods was a natural and probable consequence of theft of those goods). For a discussion of the use of statistical evidence in criminal trials, and a comparison of the frequency model and the subjective model of statistical theory, see R. Wehmhoefer, Statistics in Litigation: Practical Applications for Lawyers § 15 (1985).

[43] MCM, 1984, Part IV, para. 43a(4).

prove any certain intent, but the act would have to be quite different from the consensual sexual intercourse committed by our accused.

What if the accused's act was not consensual sexual intercourse, but rape? It is just as possible to transmit the HIV during forcible sex as during consensual sex. Is the HIV-infected rapist's conduct within the "felony murder" rule? What if, while committing a burglary, the accused struggles with a store clerk, their blood mingles, and the accused transmits HIV to the clerk?

These are tantalizing legal questions, and they illustrate why *books* are written about felony murder—and why it would be a digression to pursue the subject here. Judges will have to answer these questions in light of the whole history and legislative rational for felony murder.[44]

Attempted Murder: Summary

Of the three types of attempted murder, the charge of intentional killing or infliction of great bodily harm seems most amenable to typical AIDS-related facts. Even so, facts may arise that make murder or another type of attempted murder the appropriate charge. The next inquiry is whether manslaughter describes our accused's culpable conduct.

Article 119 (Manslaughter)

(a) Any person . . . who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter. . . .

(b) Any person . . . who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense . . . directly affecting the person; is guilty of involuntary manslaughter. . . .[45]

Article 119 sets out the elements of voluntary and involuntary manslaughter. Only voluntary manslaughter can be charged as an attempt.[46] Voluntary manslaughter requires a specific intent to kill or to inflict grievous bodily harm.[47] The act must be done in the heat of sudden passion caused by adequate provocation.[48] Under our facts, there may have been a "heat of sudden passion," and there may have been adequate provocation," but neither is of the sort recognized by caselaw.[49] Again, it is unlikely that there will be circumstantial evidence of intent or sufficient basis to infer it.

A recent case in Minnesota illustrates the type of fact pattern that might constitute voluntary manslaughter. In *United States v. Moore,*[50] the defendant, who knew he had AIDS, became angry at his prison guards. In a fit a rage, he bit them on the legs and screamed, "I hope you die." If he were deemed to have been adequately provoked, and if, in the heat of sudden passion, he bit the officers with the intention that they contract AIDS and die, Moore might be guilty of attempted voluntary manslaughter.[51]

Article 120 (Rape)

(a) Any person . . . who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape. . . .[52]

Rape has already been discussed in the context of felony murder. At a minimum, transmission of the HIV during rape is a factor in aggravation.[53] A prima facie case for rape, however, is not made out on our facts. Here the victim consented to the sexual intercourse. If the victim consented to sex, but not to sex with an HIV-carrier, is it rape? This issue was raised by an actual victim's statement and warrants a brief discussion.

For rape, the sexual intercourse must be "by force." This can be proved by the force of intercourse itself *if* the act was without the woman's consent. In our facts, both people desired to have sex with each other at the particular time and place they did. Beyond this, is there a notion of "informed consent" in rape law? Is there a sort of "caveat emptor" in the sexual arena?

When it comes to sex, there is no legal requirement that consent be either informed or wise. *Actual* consent, even if obtained by fraud, is an affirmative defense.[54] It is still legally effective consent.[55]

The effect of this rule is to place a certain amount of responsibility on the consenting partner. It is up to the partner to exercise good judgment in consenting. A normal instance of consensual sexual intercourse will not "become" rape simply because the consenting partner later discovered some unsavory fact about her lover. Entangling AIDS in

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[44] For a recent and extensive discussion of felony murder, see United States v. Jefferson, 22 M.J. 315 (C.M.A. 1986).

[45] UCMJ art. 119.

[46] MCM, 1984, Part IV, para. 44d(1)(e).

[47] *Id.* para. 44b(1)(d).

[48] *Id.* para. 44c(1)(a) & (b).

[49] *See, e.g.,* United States v. Staten, 6 M.J. 275 (C.M.A. 1979).

[50] 669 F. Supp. 289 (D. Minn. 1987); *see also* United States v. Kazenbach, 824 F.2d 649 (8th Cir. 1987); *cf.* Barlow v. Superior Court, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987).

[51] If the provocation was not adequate and the bite was not done in the heat of sudden passion, Moore might be guilty of attempted murder because there was direct evidence of his intent.

[52] UCMJ art. 120.

[53] *Cf.* People v. Johnson, 181 Cal. App. 3d 1137, 225 Cal. Rptr. 251 (1986) (transmission of the herpes simplex II virus to a rape victim was a proper factor in aggravation).

[54] MCM, 1984, Part IV, para. 45c(1)(b).

[55] In one pending case, the victim did inquire and the accused specifically denied having AIDS. He obtained her consent by his fraudulent denial. *See* United States v. Booker, 25 M.J. 114 (C.M.A. 1987). In discussing fraud in the inducement to commit sexual intercourse, Judge Cox listed several examples of "general knavery," such as " 'Of course *I'll respect you in the morning*'; 'We'll get married as soon as . . .'; 'I'll pay you ____ dollars'; and so on." *Id.* at 116. "I don't have AIDS" may well be the eighties' contribution to general—and in this instance, tragic—knavery.

the crime might turn rape into murder,[56] but it does not turn consensual sex into rape.

Article 128 (Assault)

(a) Any person . . . who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault. . . .

(b) Any person . . . who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault. . . .[57]

Counsel are familiar and comfortable with Article 128 terminology. Terms of art such as "bodily harm," "offensive touching," "grievous bodily harm", and "means or force likely" are second nature to trial attorneys. To plead our AIDS-related case under Article 128, however, it is necessary to shake off some of that familiarity. In order to "see" these Article 128 terms in our AIDS fact pattern, sexual intercourse has to be viewed as though under a microscope.

If an AIDS-related sexual act is an assault, surely it is aggravated. "Trying out" aggravated assault on our facts is a two-step process. First, we must define the terms of assault in terms of AIDS: what is bodily harm, grievous bodily harm, and a means likely to cause death or grievous bodily harm? Second, we must analyse aggravated assault with the intent to inflict grievous bodily harm, and the three theories of aggravated assault with a means likely to produce death or grievous bodily harm: by attempt, by offer, or by assault consummated by a battery.

Analysis of Terms

Bodily harm. We have all heard the judge explain that bodily harm is "any offensive touching of another, however slight."[58] In sexual intercourse, assuming ejaculation occurs, there is more touching going on than meets the eye. Semen, in this case infected semen, is touching the vagina. Under one more magnification, HIV in that semen is touching the permeable vaginal wall. The sexual intercourse itself is not an offensive touching, but placing the AIDS virus at the door to the victim's immune system certainly is. Very few people would not be "offended" if they were touched by the AIDS virus. The magnitude of the social interests involved make the touching offensive to society as well.

Grievous bodily harm. Grievous bodily harm naturally goes beyond mere offensiveness.[59] If bodily harm is the touching of the vagina with the HIV, grievous bodily harm is the transmission of the HIV virus through the vagina into the blood system.[60] Once established in the blood, HIV poses a permanent, although unpredictable, threat to that person's immune system. The virus *never* goes away. The virus *never* loses its ability to cause AIDS. In effect, the virus poises the body at the starting point of an irreversible continuum of harm that may end in death.[61] Transmission of HIV causes death or grievous bodily harm.

Means likely. "Means" is the catch-all of Article 128. It includes literally anything used in a way that could cause death or grievous bodily harm. If an aggravated assault occurred, and the accused did not use a weapon or force, he used some *means*.[62] Under Article 128, "means" have included a switchblade knife,[63] a standing ashtray,[64] a meat fork,[65] a tape recorder,[66] a football trophy,[67] a lit cigarette,[68] a beer bottle,[69] a child's aluminum baton,[70] a cowboy belt,[71] an arm cast,[72] even Marines[73]—when these items or persons were *used* in a way likely to cause death or grievous bodily harm.

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[56] *See supra* text accompanying notes 43–44.

[57] UCMJ art. 128.

[58] MCM, 1984, Part IV, para. 54c(1).

[59] *Id.* para. 54c(4)(a)(iii).

[60] *Cf.* People v. Johnson, 181 Cal. App. 3d 1137, 225 Cal. Rptr. 251 (1986) (transmission of the herpes simplex II virus to a rape victim was infliction of great bodily injury).

[61] One analogy is that transmitting HIV to the victim is like handcuffing her to a briefcase full of explosives for the rest of her life. The briefcase may never explode. Or it may explode and only maim the victim. Or the explosion may kill the victim and, to analogize one step further, innocent bystanders.

[62] The distinction between a "means" and a "weapon" is one of traditional usage. "The phrase 'other means or force' may include any means or instrumentality not normally considered a weapon." MCM, 1984, Part IV, para. 54e(4)(a)(ii). Because the focus is on the use to which the object is put, the same object might be a "means" or a "weapon." For example, in Schrader v. White, 761 F.2d 975 (4th Cir. 1975), a magistrate cited several objects used as "weapons" inside a prison: a pencil, an electrical cord, a lock inside a sock used as a bludgeon, pool cues, brooms, and chairs. Note that viruses can be a weapon, as in biological warfare.

[63] United States v. Willingham, 20 C.M.R. 575 (A.F.B.R. 1955).

[64] United States v. Matfield, 4 M.J. 843 (C.M.A. 1978).

[65] United States v. Hamm, 10 C.M.R. 209 (A.B.R. 1953).

[66] United States v. Pennington, 45 C.M.R. 846 (N.C.M.R. 1971).

[67] United States v. Berry, 2 M.J. 576 (A.C.M.R. 1977).

[68] United States v. Gray, 21 M.J. 1020 (N.C.M.R. 1986).

[69] United States v. Clark, 39 C.M.R. 687 (A.B.R. 1968); United States v. Mercer, 11 C.M.R. 812 (A.F.B.R. 1953); United States v. Brown, 4 C.M.R. 633 (A.F.B.R. 1952) ("7-up" bottle); *but see, e.g.*, United States v. Johnson, 15 C.M.A. 384, 35 C.M.R. 356 (1965) (a beer bottle is not a means likely as a matter of law).

[70] United States v. Justice, 32 C.M.R. 31 (CMA 1962).

[71] United States v. Patterson, 7 C.M.A. 9, 21 C.M.R. 135 (CMA 1956); United States v. Hayes, 45 C.M.R. 669 (A.C.M.R. 1972); United States v. Cyrus, 41 C.M.R. 959 (A.F.C.M.R. 1970).

[72] United States v. Ashby, 50 C.M.R. 37 (N.M.C.R. 1974).

[73] United States v. Piatt, 17 M.J. 442 (C.M.A. 1984).

In this case, the HIV is the means that causes harm or death. The use is its placement in the victim by sexual intercourse. Focus on what the accused did with the HIV that was in his body. When, through unprotected sexual intercourse, he put the HIV inside the victim, he *used* the virus in a harmful, deadly way. Like putting poison in the victim's drink, the accused put the virus in a place where it could cause death or grievous bodily harm.[74] When used in this way, the virus is a means of assault.

The means of assault must be used in such a way that death or grievous bodily harm is *likely* to result.[75] It is not required that either be actually inflicted. How "likely" does it have to be that the means will produce death or grievous bodily harm? How likely is it that harm will result from the AIDS virus being applied (deposited or transmitted) to the victim?[76]

Likelihood, like probability in our discussion of murder,[77] is not the sole province of statisticians. Numbers do not mean anything in themselves. Experts can testify as to numbers, percentages, and statistical data on a particular likelihood. That testimony is given meaning and weight only by analysing it in terms of caselaw.[78] This new "means," the AIDS virus, and its likelihood to cause death or grievous bodily harm, must be viewed in context of the likelihood the law attributes to more familiar means of assault.[79]

With these definitions of bodily harm, grievous bodily harm, and means likely in hand, our accused's conduct will be measured against the two types of aggravated assault.

Analysis of Types of Aggravated Assault

Aggravated assault can be the intentional infliction of death or grievous bodily harm, or it can be using a means likely to cause that result. The two types of aggravated assault will be analysed using the definitions of bodily harm, grievous bodily harm, and means likely discussed above.

Aggravated assault in which grievous bodily harm is intentionally inflicted. To charge our soldier with this type of aggravated assault, the victim must have actually sustained grievous bodily harm. In the working definition, this means that the victim actually received the virus into her blood system through sexual intercourse with the accused. The government must then prove the specific intent of the accused, and face the same obstacles of proof previously discussed in regard to this element. The law does allow proof of intent by circumstantial evidence.[80] From the sexual intercourse alone, however, it is unlikely that anything beyond an intent to have sex can be inferred. As under Article 118, except for admission or confession of the accused, this element will be difficult to prove.

Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. Assault with a means likely to cause death or grievous bodily harm does not require a specific intent.[81] It also is not necessary that death or grievous bodily harm actually result from the act.[82] It does require that the accused used a certain means in a way that was likely to produce death or grievous bodily harm.[83] The use of the means may constitute an attempt, an offer-type assault, or an assault consummated by a battery.[84] Although the charge looks

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[74] Poison is "a substance, usually a drug, causing illness or death when eaten, drunk, or absorbed in relatively small quantities." Webster's New World Dictionary of the American Language 1130 (1966). Poisoning is an assault and battery. MCM, 1984, Part IV, para. 54c(2)(c). *See, e.g.*, D.C. Code Ann. § 22–501 (poisoning with intent to kill is punishable by up to 15 years confinement). HIV-infected semen can be a poison. *Cf.* Shrader v. White, 761 F.2d 975 (4th Cir. 1985) (human excrement can be a poison) (dicta). One way to plead this under Article 128 might be "with a means likely . . . to wit, [the accused's] bodily fluid while he was then infected with Human Immunosuppression Virus."

[75] MCM, 1984, Part IV, para. 54b(4)(iv).

[76] Compare this to the likelihood of grievous bodily harm resulting from "application" of a beer bottle or other familiar means of assault to the victim. Although it is not necessary that the injury be permanent to be grievous, it is notable that these types of harm differ from the harm of the AIDS virus in that they can heal or be cured.

[77] *See* supra text accompanying notes 38–42.

[78] *See* United States v. Schroder, 47 C.M.R. 430 (A.C.M.R. 1973). The accused was convicted of aggravated assault by means of a CS grenade set off in a closed hootch. On appeal, an expert testified that it was improbable that death or grievous bodily harm could have resulted from the appellant's act. The Army court held that "evidence presented by appellant . . . only indicates that death or serious bodily harm would not be a probable consequence to exposure to CS agent in a closed room for ten minutes. . . . This evidence is not controlling in the crucial determination as to whether the means used constituted an aggravated assault because of the manner in which the CS agent was used." *Id.* at 434.

In determining the probativeness of statistical evidence, determining the basis of the numbers is crucial. Statistics must first of all be accurate. Consider the difficulties, as well as the politics involved, in documenting AIDS cases. For example, researchers at the Centers for Disease Control estimate that about 10% of AIDS cases go unreported because families often object to listing AIDS as the cause of death. Gallo, *First Word*, Omni, Dec. 1987, at 10. This obviously skews statistics on AIDS-related deaths. Further, statistics have extrapolative value only if the acts they report are documentable and repeatable. *Neither* is true of sex. No two acts of intercourse, even between the same partners, is repeatable in terms of the physiological variables involved. For example, sometimes conception occurs, and sometimes it does not. Infectivity and susceptibility to infection vary from person to person and from time to time. Thus, the relevancy of statistical data is questionable. No amount of statistical reporting can predict the precise mathematical likelihood that any given sexual act will result in HIV transmission. This is one example of why the law tends toward using the subjective model of statistical theory. An accused takes his victim as he finds her; an accused does his crime and takes his chances. *See* R. Wehmhoefer, supra note 42.

[79] Foreseeability is another legal concept that may shed light on the likelihood analysis. *See, e.g.*, United States v. Henderson, 23 M.J. 77, 80 (C.M.A. 1986) (death was foreseeable because "merely providing a controlled substance [to another] is 'an act inherently dangerous to human life' "); United States v. Sargent, 18 M.J. 331 (C.M.A. 1984); United States v. Moglia, 3 M.J. 216, 217 (C.M.A. 1977); State v. Thomas, 118 N.J. Super 377, 28 A.2d 32 (1972) (jury could reasonably find that heroin user's death was regular, natural, and *likely* consequence of the heroin sale; Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984) (as a matter of law, unlawful distribution of cocaine is conduct potentially dangerous to human life). In United States v. Witt, 21 M.J. 637 (A.M.C.R. 1985), the court in dicta cited common human experience as pertinent to forseeability: "It is well known . . . that people who ingest drugs can [have adverse reactions]. Drug dealers know or reasonably can be expected to know this fact." *Id.* at 642 n.8.

[80] MCM, 1984, Part IV, para. 54c(4)(b)(ii).

[81] *Id.* para. 54c(4)(a).

[82] *Id.* para. 54c(4)(a)(iv).

[83] *Id.* para. 54c(4)(a)(ii).

[84] *Id.* para. 54b(4)(a)(i).

the same on its face, it is useful to dissect these underlying theories. This will show how the peculiarities of AIDS-related facts might operate.

Under the first theory, the first element of aggravated assault with a means likely is that "the accused attempted to do . . . bodily harm to a certain person." Note that while an attempt-type assault requires a specific intent,[85] that intent need be only the intent to do *bodily harm*. We have said that bodily harm is offensive touching. The offensive touching is the *touch* of the virus. Styled this way, what constitutes an attempt-type assault?

There are two ways to look at attempt under our facts. Perhaps the accused attempted to have sexual intercourse with his victim. He failed or was prevented from doing the act. Another scenario is the accused completed the sexual intercourse, deposited the virus in the victim's vagina, but the virus was not *transmitted* into the victim's blood.

In the first scenario, the accused intends to have the intercourse. He intends to put his infected semen inside the victim's vagina. This deposit constitutes the offensive touching and, thus, the bodily harm. If he tries to commit the intercourse, but is prevented from or otherwise fails to complete the act, has he committed an attempt-type aggravated assault? Yes, so long as his overt acts toward completing intercourse are sufficient to constitute a criminal attempt.[86]

In the second scenario, the accused completed the intercourse.[87] He deposited the infected semen in the victim but she did not become infected. Is the government's theory of the case an attempt-type assault? No. The attempt element is the attempt to do *bodily harm*.[88] The accused did the bodily harm. He touched his victim with the HIV virus. It is not necessary that death or grievous bodily harm actually be inflicted. He also did all he could to *transmit* the virus to her. Under this analysis, he is chargeable with inflicting bodily harm with a means likely to produce death or *grievous* bodily harm.

The second type of aggravated assault with a means likely, that the accused "offered to do . . . bodily harm," is an unlawful demonstration of violence.[89] The demonstration must cause the victim to be reasonably apprehensive that she is immediately in danger of bodily harm.[90] The charge focuses on what happened in the victim's mind at the time of the demonstration. The accused does not need a specific intent.[91] His culpable negligence is sufficient to commit the assault.[92]

The offer theory likely misses the mark. The first hurdle is whether consensual sexual intercourse or deposit of the virus can be an "unlawful demonstration of violence." Further, the victim has a reasonable and immediate fear of bodily harm *upon learning* that her sexual partner has HIV. Even if the act is somehow a demonstration of violence, the victim's fear is engendered some time later. The theory of offer, therefore, does not describe the accused's culpable conduct.

The last theory of aggravated assault with a means likely is where the accused actually inflicts the bodily harm. As seen in the discussion of attempt-type assaults,[93] if the bodily harm is the offensive touching by the virus, a consummated act of sexual intercourse with infected semen will always be a consummated assault. The offensive touching can be intentional or by culpable negligence.[94] If the act actually transmitted the virus, the government may prove that the act inflicted death or grievous bodily harm.

Article 134 (General Crimes of Disorder or Neglect to the Prejudice of Good Order and Discipline or of a Nature to Bring Discredit Upon the Armed Forces)

Article 134 seems a natural choice to describe AIDS-related misconduct. Unlike the punitive articles already discussed, AIDS-related litigation under Article 134 will not likely be a battle of the elements. It will, however, exercise broad legal issues.

The general article's elements are simple: the accused did or failed to perform an act and, under the circumstances, his act was prejudicial or service-discrediting.[95] The analysis starts with the result or effect of the accused's conduct. Under our facts, the conduct was the accused having unprotected sexual intercourse with a woman even though he knew he had AIDS. The government must show that this act had a "reasonably direct and palpable"[96] prejudice to good order and discipline or that it injured the reputation of the Army, brought it into disrepute, or tended to lower it in public esteem.[97] This is a question of fact.[98] Counsel will have the opportunity to prove those facts after answering Article 134's questions of law.

The general article presents counsel with the same legal issues regardless of what misconduct is alleged. These issues

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[85] *Id.* para. 54c(1)(b)(i).

[86] *See* United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (attempts).

[87] This assumes ejaculation.

[88] MCM, 1984, Part IV, para. 54b(4)(a)(i).

[89] *Id.* para. 54c(1)(b)(ii).

[90] *Id.*

[91] *Id.*

[92] Id.

[93] *See supra* text accompanying notes 87–88.

[94] This snares an accused who says he never intended the ejaculation that occurred. Here the theory is assault consummated by a battery. Battery can be done intentionally or be culpable negligence. MCM, 1984, Part IV, para. 54c(2)(d).

[95] *Id.* para. 60b(2).

[96] *Id.* para. 60c(2)(a).

[97] *Id.* para. 60c(3).

include whether an offense is stated,[99] whether there was notice of criminality,[100] whether the offense was properly charged under another punitive article or law,[101] and whether the 134 offense is an attempt to dispense with the need to prove an element of an offense under the specific punitive articles.[102] In an area of the law which, by definition, includes "everything else,"[103] the peculiar twists of AIDS-related fact patterns will have to take their turn on the analytical framework of Article 134.

Substantive Crimes: Summary

Charging AIDS-related misconduct must be viewed as in the formative stages until a body of law is established. All the analysis in the world is only analysis until the courts "grade the papers." This analysis has been an academic discussion of a certain set of facts under the punitive articles. It is not the "school solution." Nor did it take into account other important factors in the charging decision, such as agency policy and policy considerations. AIDS-related misconduct is a new subject. It has broad ramifications for the military and for society. Therefore, perhaps more than any other crime on a prosecutor's docket, the disposition of AIDS-related misconduct must include a close analysis of the legal merits, policy concerns of the military community, and the "social calculus" at large.

The Limited Use Policy

A discussion of AIDS-related courts-martial is not complete without an overview of Department of Defense and Department of the Army policy issues.[104] AIDS has been addressed by various departmental letters and memoranda. These policies implement, among other things, the blood testing program, a data collection scheme, and the use and dissemination of information concerning AIDS patients.

Department of Defense and Department of the Army policies set limitations on the use of certain information about a person's infection with HIV. This "limited use" scheme is the basis of litigation that has stalled pending AIDS-related courts-martial. Briefly stated, the government is precluded from introducing information at courts-martial provided as part of the epidemiologic assessment.[105] Recent litigation concerns whether the government may introduce results of HIV tests at courts-martial.[106]

Regulatory construction and policy interrelationship is not normally a subject of much interest. In this instance, however, interest in these regulatory questions is high because the fancy legal questions translate into questions of what "tools" *are* in the commander's box. The nature of the evidence allowed to prove the accused's HIV infection will determine whether the commander can reach the accused's AIDS-related misconduct by courts-martial.

Conclusion

This has been a "situation report" on issues involved in bringing AIDS-related misconduct to trial and, it is hoped, to justice. The rustle you hear is the sound of society marshalling its defenses against their major health and welfare threat. Cases are being prosecuted and statutes are being drafted. Because of the unique requirements of its mission, the Army has been in the forefront of this defensive effort with its blood testing and data collection programs. Army law and policy are also in the forefront of the process by which the deadly disease of AIDS is becoming an aspect of deadly crime.

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[98] A wide variety of misconduct has been held to violate the general article. *See, e.g.*, United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) (false bomb threat phoned in to a charge of quarters); United States v. Kopp, 9 M.J. 564 (A.F.C.M.R.), *petition denied*, 9 M.J. 277 (1980) (The accused wrongfully set off a false fire alarm at the barracks. The court held that his act "resulted in considerable *inconvenience* to the residents [of the barracks] and *expense* to the government. Such action is palpably and directly prejudicial to good order and discipline and is an offense chargeable under [Article 134]." *Id.* at 566 (emphasis added)); *see also* United States v. Sadinsky, 14 C.M.A. 563, 34 C.M.R. 343 (1964) (jumping from a ship); United States v. Oakley, 11 C.M.A. 529, 29 C.M.R. 345 (1960) (wrongful possession of another's identification card); United States v. Scott, 24 M.J. 578 (N.M.C.M.R. 1987) (enticing another to engage in sexual intercourse for hire and reward).

[99] *See, e.g.*, United States v. Wickersham, 14 M.J. 404 (C.M.A. 1983) (unlawful entry); United States v. Gaskin, 12 C.M.A. 419, 31 C.M.R. 5 (1961); United States v. Hogsett, 8 C.M.A. 681, 25 C.M.R. 185 (1958) (wrongfulness must be pled).

[100] United States v. Johanns, 20 M.J. 155 (C.M.A. 1985); United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Lowery, 21 M.J. 998, 1000 n.2 (A.M.C.R. 1986) (even absent codification in the 1984 Manual for Courts-Martial, the accused was on notice that his sexual conduct with enlisted soldiers constituted a crime); United States v. Baker, NMCM 84 4043 (N.M.C.M.R. 30 Aug. 1985).

[101] *See, e.g., United States v. Martinson*, 21 C.M.A. 109, 44 C.M.R. 163 (1971).

[102] United States v. Taylor, 23 M.J. 314 (C.M.A. 1987); United States v. Dyer, 22 M.J. 578 (A.C.M.R. 1986); United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Lumbus, 49 C.M.R. 248 (C.M.A. 1974); United States v. Maze, 21 C.M.A. 260, 45 C.M.R. 34 (1972); United States v. Wallace, 31 C.M.R. 536 (A.F.B.R. 1961); United States v. Thompson, 24 C.M.R. 87 (A.F.B.R. 1957).

[103] This is *not* to say that Article 134 is a "catch-all." "[A] wide variety of conduct can be alleged and found to constitute an offense [under Article 134]. The kind of conduct that is service-discrediting or prejudicial to good order and discipline is subject, however, to limitations other than the imagination of the drafter." United States v. Maze, 21 C.M.A. 260, 263, 45 C.M.R. 34, 37 (1972).

[104] The following AIDS policies have been issued: 10 U.S.C.A. § 1074 note (West Supp. 1987); DOD Memorandum, 20 Apr 1987, subject: Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV); DOD Memorandum, 24 Oct 1985, subject: Policy on Identification, Surveillance, and Disposition of Military Personnel Infected With Human T-Lymphotrophic Virus Type III (HTLV-III) [hereinafter 1985 DOD Memo.]; HQDA Memorandum, DAPE-HRL-S, 22 May 1987, subject: Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV); HQDA Ltr. 40-86-1.

[105] 1985 DOD Memo.

[106] United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987), *stay granted*, No. 88-08/AR (C.M.A. 24 Nov. 1987).

DAD Notes

When the Military Judge Must Say Good-bye

The U.S. Army Court of Military Review has reminded military judges of their obligation to recuse themselves when they are disqualified under Rule for Courts-Martial 902[1] from presiding over a court-martial. The military judge cannot obviate this disqualification by directing a trial by members.

In *United States v. Wiggers,*[2] the military judge advised counsel that he had presided over a companion case. The military judge believed that the co-accused, who would be a government witness in the present case, had lied in his statements to the court.[3] The trial defense counsel challenged the military judge, based on the judge's predisposition as to the credibility of the witness, and based on the defense desire for a trial by military judge alone.[4]

The military judge denied the defense challenge. The military judge directed trial by members because "the prosecution is . . . entitled to [an] impartial, unbiased factfinder."[5] He indicated that the defense only had a right to a fair trial, not a trial before military judge alone. The military judge did not recuse himself, based on the inconvenience of assuring the presence of another judge, given the geographical distribution of judges in the Federal Republic of Germany.[6]

In the presence of an objection, a military judge must disqualify himself where his "impartiality might reasonably be questioned."[7] Furthermore, even in the absence of objection, a military judge must disqualify himself if he has "a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding."[8]

In *Wiggers,* the court of military review held that the military judge's knowledge of mendacity by the witness was gained through a judicial proceeding and, therefore, was "judicial, not personal, in nature."[9] The knowledge of the military judge did not disqualify him under R.C.M. 902(b)(1) from presiding over the court-martial.[10]

The Army court posited that extrajudicial, personal knowledge is also a basis for disqualification under R.C.M. 902(a). Nevertheless, R.C.M. 902(a) requires "special caution" where the military judge possesses knowledge obtained in a judicial forum.[11]

The court held that the military judge had the discretion to recuse himself or to direct trial by members, but that the latter choice in this case was "foolhardy."[12] The court considered the military judge's responsibility to rule on the evidence without "inevitably alerting" the members to his knowledge regarding the witness to be an "impossible task."[13] The court felt that the military judge was faced with a "Hobson's choice," risking mistrial or "almost certain reversal on appeal."[14] Consequently, the court found that the military judge was disqualified and "under the circumstances of this case," should have recused himself instead of directing trial by members.[15]

The decision of the court was correct, but its reasoning was, in part, flawed. A military judge who is disqualified under R.C.M. 902 does not have the option of recusal or directing trial by members. Recusal is mandated where the military judge is disqualified under R.C.M. 902, except where the disqualification can be and is waived.[16] The option of recusal or directing trial by military judge alone may still be available, however, where a challenge, or the military judge's involvement, do not reach the threshold of R.C.M. 902.

The court in *Wiggers* did not say that an accused had a right to trial by military judge alone. Where the military judge is disqualified under R.C.M. 902, however, the Rule preserves the judge-alone option. Therefore, the general nature of R.C.M. 902(a) gives trial defense counsel a useful weapon in pursuing a judge-alone trial. A military judge's impartiality "might reasonably be questioned" in a case even though the military judge might not be disqualified under the specific grounds of R.C.M. 902(b). Once a valid

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 902 [hereinafter R.C.M.].

[2] 25 M.J. 587 (A.C.M.R. 1987).

[3] *Id.*, slip op. at 2.

[4] *Id.* at 3.

[5] *Id.*

[6] *Id.*

[7] R.C.M. 902(a).

[8] R.C.M. 902(b)(1).

[9] *Wiggers,* slip op. at 7.

[10] *Id.*

[11] *Id.* at 7–8.

[12] *Id.* at 8 (citing United States v. Butler, 14 M.J. 72 (C.M.A. 1982)).

[13] *Id.* at 9.

[14] *Id.*

[15] *Id.* at 2. The court noted that the military judge recognized that he was disqualified. *Id.* at 8.

[16] R.C.M. 902(d)(3). *See also* R.C.M. 902(e).

challenge has been made, the judge must disqualify himself and allow a replacement judge to hear the case. Thus, the defense has preserved its option of a true choice of forum in the case. Captain Kathleen A. VanderBoom.

Use of an Accused's Prior Immunized Testimony

When an accused has testified under a grant of immunity at a prior trial, defense counsel must raise the issue before the judge of any potential use of evidence derived from the immunized testimony. In *United States v. Lucas,*[17] the Court of Military Appeals held that, absent a complaint by defense counsel, the government has no burden to show that its evidence is wholly from an independent legitimate source and not from the accused's immunized testimony.[18] The prosecutor in *Lucas* had previously examined Lucas during immunized testimony in a prior court-martial.

The court also stated that the military judge has a sua sponte duty to intervene if he believes that prohibited use is being made of the immunized testimony. In *Lucas,* the court found no evidence that the government used the accused's immunized testimony, and thus, there was no error.

Although the court affirmed the conviction in *Lucas,* it cautioned both trial and defense counsel of the dangers presented when the accused has previously given immunized testimony. The court stated that prosecutors should be aware of the issue and take steps to resolve any conflict early in the trial.[19] The court stated that while it was "technically correct" when trial counsel stated he had not acted in "any disqualifying or inconsistent capacity" in the case, the trial counsel "might better at that time have informed the judge of his earlier role."[20] The court was also puzzled by the defense counsel's failure to question the trial counsel's role as prosecutor in the court-martial at which the accused gave his immunized testimony.[21] By merely raising the issue, the defense places upon the government the heavy burden of showing that it will not make any use of the immunized testimony given by the accused or any evidence derived from it. Defense counsel should always bring the issue of the prior immunized testimony to the judge's attention and put the government to its burden. If defense counsel fails to raise the issue, the court stated, "the specter of ineffective assistance of counsel looms," though ineffective assistance was not urged in this case.[22] The court also stated that "the judge should not invoke the doctrine of waiver" and that "plain error" might be found.[23] Captain Kevin G. Sugg.

Sixth Amendment Limits on Victim Impact Evidence

The Army Court of Military Review recently limited the use of victim impact evidence where it would impede an accused's sixth amendment right to a fair trial. The Army court found that trial counsel's repeated references to the trial experiences endured by the rape victim were impermissible considerations on sentencing.

Contrary to his pleas, the accused in *United States v. Carr*[24] was convicted of rape and attempted forcible sodomy by a general court-martial composed of officer and enlisted members. During argument on sentencing, trial counsel elaborated upon the heinous nature of the crime of rape. Trial counsel then proceeded to call attention to the suffering and humiliation inflicted upon the victim as a consequence of her having to testify against her attacker. Defense counsel objected and stated that the defendant was merely "exercising his constitutional right to confront and cross-examine witnesses against him [and that] is not a matter in aggravation."

The military judge overruled the objection and allowed the argument as a proper matter in aggravation. The military judge specifically noted that the argument concerned "what she's had to go through as a result of the conviction of the crime."[25]

Rule for Courts-Martial 1001(b)(4) provides two independent "windows" for the consideration of matters on aggravation. "The trial counsel may present evidence as to any aggravating circumstances directly *relating to* or *resulting from* the offenses of which the accused has been found guilty."[26] The argument as presented in the instant case asked the members to consider matters in aggravation that were being presented through the second prong as matters "resulting from" the offense.

The category of evidence that directly results from the offense has been popularized as repercussion evidence. The discussion to R.C.M. 1001(b)(4) provides that repercussion "[e]vidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused."[27] Prior decisions of the Army Court of Military Review have liberally construed the provisions of R.C.M. 1001(b)(4) to permit expanded introduction of repercussion evidence.[28]

As the Manual has been interpreted, trial counsel argued matters that have been traditionally viewed as a result of the offense and therefore within the scope of R.C.M.

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[17] 25 M.J. 9 (C.M.A. 1987)

[18] *Id.* at 10.

[19] *Id.* at 11.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 10.

[24] ACMR 8601342 (A.C.M.R. 18 Nov. 1987).

[25] *Id.*, slip op. at 2.

[26] R.C.M. 1001(b)(4) (emphasis added).

[27] R.C.M. 1001(b)(4) discussion.

[28] *See, e.g.,* United States v. Witt, 21 M.J. 637, 641 (A.C.M.R. 1985) (only requires, as a threshold, *"a reasonable linkage between the offense and the alleged effect thereof").* The willingness expressed by the court to create procedures that will allow for the consideration of evidence broad in scope is hopelessly at odds with the design of the Manual to provide specific pigeonholes for the introduction of matters in aggravation.

1001(b)(4). The decision in Carr, however, limits the heretofore broad reading of R.C.M. 1001(b)(4) and finds that the government's proffered argument was improper.

The decision of the Army court has three important ramifications. First, the court has applied the rules of procedure to define the proper scope of argument. The Army court noted that "[w]hile ensuring fundamental fairness at trial unavoidably impacts upon all parties thereto, such 'impacts,' in our view, relate directly to the due administration of the military justice system rather than to offenses on which there are findings of guilty."[29] In separating these different impacts, the Army court has indicated that it is proper to analyze government argument in the context of what is a permissible consideration under R.C.M. 1001. Thus, the rules of procedure not only govern the type of evidence that might be considered, but they can also be used to circumscribe government argument.

Second, the Army court has implicitly stated that repercussion evidence must have some basis other than simple inference. In the instant case, the victim was forced to endure "extensive direct examination and over an hour of cross-examination" in front of the members. Even though the members were able to observe the effects of the judicial process upon the victim, the court noted that "when the trial counsel was permitted to argue the impact of confrontation and cross-examination upon the victim prior to sentencing, he argued an impact neither contained in the record nor an inference that might have reasonably have been based thereon."[30] In short, unless there is direct evidence introduced on the record concerning repercussions, impact evidence will not be inferred.[31]

Finally, the court found that any adverse impacts stemming from the accused's exercise of his constitutional rights to sixth amendment confrontation could not be used against him as a matter in aggravation. The court stated that "the right to confrontation and cross-examination originates in the Sixth Amendment" and "[i]t is a due process right" that must be considered during presentencing.[32] In finding that neither party to the proceedings should directly or indirectly profit from the other's use of a due process right, the court concluded that "argument urging systemic impact resulting from the exercise of constitutional rights at trial is impermissible in aggravation."[33]

In summary, the decision of the Army court provides an important standard by which government argument can be measured. More importantly, repercussion evidence cannot be inferred. Instead, there must be direct quantifiable evidence to substantiate the alleged impacts. Finally, references by trial counsel to an accused's exercise of constitutionally mandated procedures will generally be deemed improper. As the court has expressed a concern to maintain the integrity of the trial process, statutorily mandated procedures should be accorded equal weight. Captain Ralph Gonzolez.

Preserving Multiplicity on Appeal

In *United States v. Newman*,[34] the Army Court of Military Review put trial defense counsel on notice to increase their use of a valuable trial tool: the motion for a bill of particulars made pursuant to R.C.M. 906(b). The *Newman* court concluded that trial defense counsel who allege that specifications are multiplicious for findings are charged with the responsibility of moving for a bill of particulars to make specifications more definite and certain where specifications are not clearly multiplicious on their face. The *Newman* decision made clear that the Army court "will not search the record for evidence or review the providence inquiry for the purpose of determining multiplicity for findings. The burden of raising and establishing multiplicity rests squarely with defense counsel at trial."[35]

Newman was convicted pursuant to his pleas of two specifications of larceny of currency and one specification of forgery. On appeal, defense counsel argued for the first time that the larceny and forgery specifications were multiplicious for *findings*. The court relied on several Court of Military Appeals cases in reaching its decision that the issue was waived.

The Court of Military Appeals announced general standards for determining multiplicity in *United States v. Baker*,[36] and applied these principles to larceny and false instrument offenses in *United States v. Holt*.[37] In *Baker*, the court held that charges were multiplicious if one of the charges necessarily included all the elements of the other, or if the allegations under one of the charges as drafted "fairly embraced" all the elements of the other charge.[38] In *Holt*, the accused used a false military identification card to cash false checks and was convicted of wrongful use of a false identification card and larceny by check. The larceny specifications did not show the larcenies had been committed by use of the false identification card, and defense counsel had not moved for clarification. The court held that, if defense counsel had made a motion to make the specifications more definite and specific, resulting in the inclusion of language specifying that the false identification offense had been the means of accomplishing the larceny offense, the specifications would have been multiplicious under the second of the two *Baker* tests. In the absence of

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[29] *Carr*, slip op. at 4.

[30] *Id.*, slip op. at 3.

[31] *See* United States v. Caro, 20 M.J. 770, 771 (A.F.C.M.R. 1985) (the court required the government to offer direct evidence of the expenditure of law enforcement resources that would more "straightforwardly" prove such impact rather than rely upon the defendant's mere refusal to cooperate or his false statements to investigators that allegedly caused a more intense investigation).

[32] *Carr*, slip op. at 3–4.

[33] *Id.*, slip op. at 4.

[34] ACMR 8701192 (A.C.M.R. 30 Oct. 1987).

[35] *Id.*, slip op. at 4.

[36] 14 M.J. 361 (C.M.A. 1983).

[37] 16 M.J. 393 (C.M.A. 1983).

[38] 14 M.J. at 368.

any such language in the specifications, the Court of Military Appeals refused to "go beyond the language of the specification on which the case is tried."[39]

The Army court in *Newman* further relied on *United States v. Jones.*[40] In *Jones*, the accused was convicted of larceny of currency and uttering a forged check at the same time and place and for the same amount. Although a companion conspiracy charge made it clear that there was a direct relationship between the two offenses, the specifications did not specifically allege that the forgery was the means by which the larceny was committed. Again, defense counsel failed to move for a clarification of the specifications, and the court found this failure fatal to appellant's multiplicity claim on appeal.

The lesson in *Newman* is that trial defense counsel must either raise the issue of multiplicity or ensure that the specifications make the relationship between the two offenses clear. Trial defense counsel should move for a bill of particulars to establish the connection between the two offenses.[41] Although the *Newman* court noted that a bill of particulars is not a discovery tool, and it should not be used to attempt to restrict the government's proof at trial,[42] it is a valuable tool for the defense counsel who wants to preserve the issue of multiplicity or challenge uncertain or vague specifications.[43] Captains Patricia D. White and Jon W. Stentz.

[39] 16 M.J. at 394.

[40] 23 M.J. 301 (C.M.A. 1987).

[41] R.C.M. 906(b)(6).

[42] United States v. Mannio, 480 F. Supp. 1182, 1185 (S.D.N.Y. 1979); United States v. Deaton, 448 F. Supp. 532 (N.D. Ohio 1978).

[43] *See* United States v. Alef, 3 M.J. 414, 419 n.18 (C.M.A. 1977).

Clerk of Court Note

Army Cases in the Court of Military Appeals, FY 1987

According to figures maintained by the Army Judiciary Clerk of Court, the Court of Military Appeals began FY 1987 with 394 Army cases on hand and ended the year with 208. At the beginning of FY 1987, decisions on petitions for review were being awaited in 276 cases. In 114 cases, a decision on granted issues was pending and 4 cases were awaiting decision on certified issues. During the year, some 1,136 additional petitions were filed. Review was granted in 113 cases. By year's end, only 104 petitions were pending and 104 cases were awaiting decision on the merits (2 on certified issues). Thus, there was a 63% reduction in Army cases awaiting action on petitions and a 12% reduction in cases awaiting decision on the merits.

Altogether, the Court of Military Appeals acted upon 1,297 Army petitions in FY 1987. (In addition, 2 petitions were withdrawn and 10 cases were remanded for consideration of newly-raised issues prior to action on a petition.) Of the 1,297 petitions acted upon, 8.7% were granted. Because petitions currently are being filed in only 62% of Army cases, this means that only about 5% of Army Court of Military Review decisions undergo further appellate review. Of course, all petitioned cases are examined by the CMA staff attorneys including the 69% in which the petition supplement is filed without specific errors being assigned by the petitioner's counsel.

During the year, the court issued 122 decisions in Army cases. The Army Court of Military Review decision was affirmed in 76 cases (62.3%) and was set aside, wholly or in part, in the remaining 37.7%.

The Court of Military Appeals' complete report, together with statistical reports for each court of military review, can be found in the Annual Reports of the Code Committee. In recent years, besides being issued in pamphlet form, these consolidated reports have been published in West's *Military Justice Reporter* (see volumes 18, 20, and 23 for the 1983–1985 reports).

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Contract Law Note

Acquisition of ADPE by DOD Nonappropriated Fund Instrumentalities

Recently, the General Services Administration Board of Contract Appeals (GSBCA) sustained the protests of three unsuccessful offerors even though the acquisition in dispute was conducted using nonappropriated funds. *Rocky Mountain Trading Co.*, GSBCA No. 8958–P, 87–2 B.C.A. (CCH) ¶ 19,840 [hereafter *RMTC*]. In the cases, the Department of Treasury, Office of the Comptroller of the Currency (OCC), awarded automatic data processing equipment (ADPE) contracts without obtaining delegations of procurement authority from the General Services Administration (GSA).

The OCC used nonappropriated monies to fund the acquisitions.

The protestors were vendors of ADPE. Each filed a timely protest with the GSBCA challenging OCC's actions on the negotiated acquisitions, and the GSBCA consolidated the protests. The protestors argued that the OCC failed to comply with the Brooks Act, Pub. L. 89–306, 79 Stat. 1127 (1965) (codified as amended at 40 U.S.C. § 759 (Supp. III 1985), and the Competition In Contracting Act of 1984 (CICA), Pub. L. 98–369, 98 Stat. 1175 (1984). The protestors further argued that the OCC did not comply with the Federal Information Resources Management Regulations (FIRMR) and the Federal Acquisition Regulation (FAR) when it conducted the procurements.

The OCC filed a motion to dismiss the protests. In the motion it admitted that it did not comply with these statutes and regulations in conducting the acquisition. Its lack of compliance, however, was justified as not necessary because it was using nonappropriated funds in the procurements. Moreover, the OCC maintained that it was exempt from the Brooks Act requirements because under the National Bank Act, 12 U.S.C. § 481 (1982), it was not a "federal agency" subject to the acquisition authority restrictions. Instead, the OCC stated that it operated under "independent statutory procurement authority" conferred by 12 U.S.C. § 13 (1982).

The GSBCA denied the OCC's motion to dismiss. It held that the OCC is a federal agency, and is therefore subject to the CICA, the Brooks Act, the FIRMR, and the FAR. The decision followed a similar General Accounting Office (GAO) ruling that the OCC is a federal agency, subject to the CICA and the Brooks Act. The GAO also specifically stated that the OCC is subject to its bid protest jurisdiction. The GAO opinion, however, did not address whether the OCC was subject to the FIRMR and the FAR, but stated "we understand that OCC does in fact voluntarily follow the FAR." Comp. Gen. Dec. B–225959 (6 Feb. 1987).

The Competition In Contracting Act conferred jurisdiction upon the GSBCA to determine whether an ADPE acquisition is subject to the Brooks Act. 40 U.S.C. § 759(f)(1). Congress later made this jurisdiction, which had been a three-year test program, permanent in the Omnibus Appropriations Act, Pub. L. Nos. 99–500 and 99–591. The Brooks Act grants to the GSA sole authority over ADPE acquisitions by "federal agencies" not otherwise exempted from the law. The OCC is not expressly exempted from the requirements of the Brooks Act. The GSBCA therefore ruled that its jurisdictional authority extended to OCC ADPE acquisitions because: the OCC is a federal agency not expressly exempted from the Brooks Act and the CICA; and the board's jurisdiction over ADPE acquisitions includes acquisitions funded with nonappropriated funds. The Department of Treasury did not appeal this decision.

In the wake of this GSBCA decision, and the companion GAO ruling, the question that arises is whether Department of Defense (DOD) nonappropriated fund instrumentality (NAFI) contracting officers who procure ADPE must comply with the CICA, the Brooks Act, the FIRMR, and the FAR. The answer to this question is uncertain in view of the jurisdictional authority of the GSBCA to determine whether a procurement is subject to the Brooks Act (and therefore the FIRMR). The language of the GSBCA and GAO opinions on the applicability of procurement statutes and regulations to the OCC are instructive on this point.

CICA

The GAO examined the legislation creating the OCC and determined that the OCC was an executive agency subject to the substantive portions of the CICA, including GAO's bid protest jurisdiction. Unlike the OCC, however, DOD NAFIs are not created by Congress, but are created by the agencies themselves. Accordingly, the GAO held that DOD NAFIs "are beyond our bid protest jurisdiction, since they are not 'federal agencies.'" Comp. Gen. Dec. No. B–225959 (6 Feb. 1987); *see* GAO Bid Protest Regulations, 4 C.F.R. § 21.3(f)(8) (1986).

This GAO ruling should not be confused with an earlier GAO opinion in which the GAO asserted jurisdiction under CICA over a procurement involving an Air Force NAFI. *Artisan Builders*, Comp. Gen. Dec. B–220804 (24 Jan. 1986), 86–1 CPD ¶ 85. In that case, the GAO acknowledged that its bid protest regulations do not provide it with jurisdiction over protests of procurements by NAFIs. Nevertheless, GAO asserted jurisdiction because the procurement was conducted by the Williams Air Force Base appropriated fund contracting officer, *who used FAR procedures and clauses.* Therefore, the GAO viewed the facts of the protest as a violation of procurement statutes and regulations (the FAR) by the Air Force, a federal agency. Under this reasoning, if the Air Force had accomplished the NAFI ADPE procurement by a nonappropriated fund (NAF) contracting officer, using NAF contracting procedures, GAO would have been prevented from considering the protest.

On the other hand, the GSBCA in *RMTC* stated that "it could find no indication in the language of CICA, or its legislative history, that Federal agencies using nonappropriated funds, other than those subject to chapter 137, title 10, United States Code, are exempt from CICA." Therefore, although its opinion did not decide whether DOD NAFI procurements are subject to CICA and the protest jurisdiction of the board, it is possible that the GSBCA may reach this conclusion in the future.

Brooks Act

Both the GAO and the GSBCA agreed that the OCC is subject to the Brooks Act. The GAO opinion, however, does not state whether the GAO would consider an ADPE procurement by a DOD NAFI subject to the Brooks Act. The GSBCA ruling in *RMTC* does not resolve this question either, but does provide some guidance on this point.

The Brooks Act, Pub. L. 89–306, 79 Stat. 1127 (1965), was enacted as an amendment to the Federal Property and Administrative Services Act of 1949 (FPASA). It authorizes the Administrator of the GSA to coordinate and provide for the economic and efficient purchase of ADPE by "federal agencies." In *RMTC*, the GSBCA determined that the OCC was a "federal agency," and thus was subject to the Brooks Act. A federal agency under the provisions of the Brooks Act is defined as any executive department or independent establishment in the executive branch. 40 U.S.C. § 472(a)–(b) (1982). This broad definition arguably permits the GSBCA to define a DOD NAFI as a federal agency. This is not, however, an inescapable conclusion.

There are important differences between the OCC and DOD NAFIs that the GSBCA has not yet considered. Perhaps the most important is that the OCC is created by Congress, in 12 U.S.C. § 481, whereas DOD NAFIs are established and operated under departmental regulations issued by the military department secretaries. The fundamental status of DOD NAFIs as federal instrumentalities, as buttressed by numerous federal court cases, must be carefully scrutinized in any decision by the GSBCA.

In *RMTC*, the GSBCA also addressed the use of nonappropriated funds in the acquisition, stating that "[t]here is nothing in the language of the FPASA or the Brooks Act which exempts Federal agencies operating with funds which are not subject to the annual appropriations process." This, of course, was contrary to the position taken by the OCC. The GSBCA stated in the opinion that conservation of appropriated funds is only one purpose served by the statute. Another and, in their opinion, more important purpose, is the credibility and integrity of government officials in their procurement actions. The GSBCA concluded that the legislative history of the Brooks Act indicates an intent not to limit the coverage of the statute to federal agencies operating with appropriated funds.

Therefore, although the GSBCA has not yet decided whether an ADPE procurement by a DOD NAFI is subject to the Brooks Act, the *RMTC* opinion indicates that its decision will be in the affirmative. If the board so holds, DOD will experience significant economic costs, because virtually no protests on DOD NAFI procurements are presently entertained by the GAO or the GSBCA.

FIRMR and FAR

In *RMTC*, the GSBCA reached the conclusion that the OCC was subject to the Brooks Act. The concomitant decision was that the OCC was also subject to the FIRMR *and* the FAR. The GSBCA's reasoning on this point is straight forward. It is well settled that if an ADPE procurement is subject to the Brooks Act, then it must comply with the requirements of the FIRMR. Furthermore, the FIRMR states that the FAR *must be used* by executive agencies for all applicable acquisitions. 41 C.F.R. § 201–1.601 (1986). Thus, an acquisition is subject to the FAR through the FIRMR.

Conclusion

Based on the above, it would seem there is the possibility that DOD NAFIs may be held to the strict acquisition requirements set forth in the Brooks Act and the FIRMR. As discussed, the GSBCA has held that one federal agency using nonappropriated funds to buy ADPE is subject to both the Brooks Act and CICA.

While there is precedent from the GAO that DOD NAFIs are not required to follow the acquisition requirements set forth in the Brooks Act and the FIRMR, the government-wide authority of the GSA over ADPE acquisitions seems to be making inroads. The GSA has not yet determined, however, that DOD NAFIs are subject to these requirements. Moreover, the Department of Defense has not stated that DOD NAFIs need comply with those requirements.

Until that policy is changed, how DOD nonappropriated fund instrumentalities acquire ADPE is a question that must be addressed by each military department. Legal advisors should ensure that ADPE acquisitions at their commands comply with agency regulations.

Regulations pertaining to ADPE acquisitions may be found in DFARS Part 70 and AFARS Part 70. Additionally, the Army has published limited guidance in this area, prescribing that in the selection and acquisition of ADPE by NAFIs, existing DOD Directives, DOD Instructions and Army Regulations should be used as guidelines. Dep't of Army, Reg. No. 215–1, Morale, Welfare, and Recreation—The Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities para. 21–13 (20 Feb. 1984).

The U.S. Army Community and Family Support Center, the Army proponent for NAF contracting, is carefully reviewing this Army NAF contracting guidance. Although the new NAF contracting regulation, Army Reg. 215–4, should be published by 1 January 1988, the initial publication will not change current guidance on ADPE procurement by NAFIs. That will come, if necessary, after careful study of the issues involved. Major Munns.

Criminal Law Notes

Confidentiality and the AWOL Client

Suppose your client goes AWOL while pending court-martial charges. Subsequently, the client phones you and tells you where he is living. You advise the client to surrender, but he refuses to do so. Now that you know the client's location, are you ethically obligated to disclose it? Can you be compelled to answer questions regarding the client's whereabouts? Would it matter if it were one of the client's relatives who phoned you and revealed the client's location? What if the client does not tell you his location, but during the telephone conversation he reveals information from which you can determine his whereabouts?

The issue of confidentiality and the fugitive client is an old and recurring one.[1] Fortunately, the issue is resolved for Army lawyers by Army Rule of Professional Conduct

[1] For a discussion of the history of the American Bar Association (ABA) opinions on this issue, see Lefstein, *Confidentiality and the Fugitive Client*, 1 Crim. Just. 16 (1986).

1.6.[2] This rule prohibits the disclosure of information relating to representation of a client. There are limited exceptions to this rule,[3] but none that allows the disclosure of an AWOL client's whereabouts. The only provisions of the Army Rules of Professional Conduct that even arguably permit disclosure of such information are Army Rules 3.3(a)(2) and 4.1. These provisions require a lawyer to disclose information necessary to avoid assisting a criminal act by the client. Does failure to disclose an AWOL client's whereabouts equate to assisting a criminal act? ABA Formal Opinion 84–349[4] resolves this question in the negative, holding that disclosure of a fugitive client's whereabouts is inconsistent with the attorney-client privilege.[5] Moreover, Army Rule 4.1 is specifically subject to the attorney-client privilege of Army Rule 1.6.[6]

The Army Rules' clear prohibition against disclosure also serves as notice that the lawyer may not be *compelled* to disclose the information. If called as a witness to give testimony regarding the client's whereabouts, the lawyer should invoke the attorney-client privilege and refuse to disclose the information, subject only to the final orders of a tribunal of competent jurisdiction.[7]

The fact that a relative reveals the accused's whereabouts, or that the lawyer is able to independently determine the accused location, does not change the obligation. The attorney-client privilege applies to all information relating to the representation regardless of the source.[8] Major Lewis.

Clarification of Recent Article

An article published in a recent issue of the Army Lawyer[9] discusses client perjury under the Army Rules of Professional Conduct. Paragraph 3 of the article notes that conflicts could arise between ethical obligations imposed by the Army Rules and those imposed by the jurisdiction in which the attorney is admitted to practice.[10] The article goes on to say that the Army Rules give *no* guidance regarding what counsel should do in such cases.[11] By way of clarification, there is guidance regarding what counsel should do. Army Rule 8.5 states that lawyers must follow the Army Rules.[12] The comments to Army Rule 8.5 reiterate this obligation by adding that the Army Rules supercede conflicting obligations from other jurisdictions.[13] The Army Rules *do not* tell the lawyer how to respond to an inquiry from the jurisdiction in which the lawyer is licensed regarding why the lawyer violated its ethics standard in favor of the Army Rules; however, the article noted above suggests two arguments that could be made in support of following the Army Rules.[14] Major Lewis.

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[2] Army Rules of Professional Conduct Rule 1.6 (1987). The rule reads as follows:
Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.
(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[3] *Id.*

[4] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84–349 (1984).

[5] In 1984, in Formal Opinion 84–349, the ABA withdrew Formal Opinions 155 and 156. These opinions had advised lawyers that disclosure of the whereabouts of a fugitive client was required. In withdrawing Formal Opinions 155 and 156, the ABA Committee on Ethics and Professional Responsibility found them to be inconsistent with the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct.

[6] Army Rules of Professional Conduct Rule 4.1(b) (1987).

[7] *Id.*, Rule 1.6 comment.

[8] *Id.*

[9] Note, *Dealing with Client Perjury Under the Army Rules of Professional Conduct*, The Army Lawyer, Nov. 1987, at 34.

[10] *Id.* at 35.

[11] *Id.*

[12] Army Rules of Professional Conduct Rule 8.5 (1987). The rule reads as follows:
Rule 8.5 Jurisdiction
Lawyers (as defined in these Rules of Professional Conduct) shall be governed by these Rules of Professional Conduct.

[13] Army Rules of Professional Conduct Rule 8.5 Comment (1987).

[14] Note, *supra note* 9, at 35.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

1987 Legal Assistance Guides

As explained in *The Army Lawyer,* Oct. 1987, at 57, "Legal Assistance Guides" have replaced the familiar "All States Guides." The 1987 Legal Assistance Notarial Guide was sent to all legal assistance offices in October. The 1987 Legal Assistance Office Administration, Deployment, Consumer Law, Real Property, and Wills Guides, as well as the 1987 Preventive Law Series and 1987 Tax Information Series, were sent to all offices in January and are currently available through the Defense Technical Information Center (DTIC). For information regarding the DTIC system, see page 55 of this issue. The remaining Legal Assistance Guides (Marriage and Divorce, Support Enforcement, and Soldiers' and Sailors' Civil Relief Act) are currently being reproduced for distribution to the field later this Spring.

LAMP Committee Report

The following information was provided by Major Karin Waugh Zucker, USAR, LAMP Committee member.

The American Bar Association's Standing Committee on Legal Assistance for Military Personnel (LAMP) met at the Naval Justice School in Newport, RI, on 23 and 24 October 1987.

The committee's CLE program on estate planning and family law, presented on 23 October, was well received by all judge advocate officers in attendance. During the program, committee members and advisors met to consider new areas in which the committee might make contributions to the legal assistance effort. A significant part of this working session was devoted to a thorough discussion of the concept and appropriate content of a federal statutory will. A similar CLE opportunity for area judge advocates will continue to be a part of LAMP meetings.

At the open session on 24 October, all advisors present gave reports on new developments, trends, and problems in legal assistance. Members expressed particular interest in the Army and Navy test programs for the computerized filing of federal income tax returns and in the strong promotion of extended legal assistance (ELAP) by the Navy and Marine Corps. On a more general note, there was considerable discussion of a proposal now before the ABA's Board of Governors to reduce dues for government lawyers. The LAMP Committee strongly supports this reduction.

Work on several projects continues, including Operation Stand-By, the newsletter, and awards. Articles of general interest to the legal assistance practitioner are always welcomed for the newsletter; submissions should be sent to Kevin P. Flood, 464 Bay Ridge Avenue, Brooklyn, NY 11220–5996.

While in Newport, the committee members, advisors, liaisons, and guests were addressed by the Commander of the Naval Justice School and had an opportunity to tour the Naval Legal Service Office (NLSO). All were impressed by the NLSO's use of technology and of reserve judge advocates, who provide legal assistance regularly on evenings and weekends.

The schedule of future LAMP meetings includes: Fort Lewis, WA, on 3–5 March 1988; Yorktown, VA, on 5–7 May 1988; Camp LeJeune, NC (tentative), in October 1988; and Colorado Springs, CO (tentative), in January 1989. All active duty and reserve judge advocates are invited to attend both the CLE programs and the working meetings of the committee.

Consumer Law Notes

Rising Interest Rates Encourage Deceptive Home Loan Practices

The Illinois attorney general has taken action against thirteen mortgage companies since May 1987 for engaging in deceptive home loan practices designed to drive up interest rates consumers pay. Recent suits allege that after leading consumers to believe that interest rates are fixed, the mortgage companies have delayed processing loans so that deadlines are missed and higher rates can be charged. In some cases, consumers have paid fees to "lock-in" interest rates and have been unable to obtain refunds after loans have failed to close at promised rates.

Maryland Has New Bad Check Law

A new Maryland bad check law (Md. Com. Law Code Ann. §§ 3–512 to 3–514 (1987 Supp.), effective July 1, 1987), gives a retailer the right, under certain circumstances, to seek a judgment of twice the amount owed up to a maximum of $1,000 if a consumer pays the retailer with a check that bounces. Under the previous bad check law, merchants were only able to obtain the amount of the check plus a $25 collection fee. Debtors now have a thirty-day "grace" period following notification that the check was dishonored in which to pay retailers what they owe (debtors previously had only ten days in which to satisfy the obligation). The "double penalty" applies only to debts or loans, such as mortgages and car payments, initiated since enactment of the new law and only when the circumstances under which the rubber check was written meet the elements of the "crime of obtaining goods and services by bad check" as defined in the Maryland criminal code.

Under the new "bad check" law, a merchant can send a "notice of dishonor" to a consumer who fails within ten days to pay a debt that a rubber check was meant to cover. This notice informs the consumer that he or she has thirty days to pay the debt (plus a $25 collection fee) or the consumer may be liable for double the amount of the check up to $1,000. This notice must also inform the consumer that he or she may face criminal charges for passing the bad check. If the retailer is not paid within thirty days of this notice, the creditor may file suit seeking the amount of the check, the collection fee, and double the amount of the check up to $1,000 in damages. Alternatively, the merchant could file suit in order to obtain the amount of the bad check without using the new law, but the merchant would be unable to recover the "double penalty" unless the

merchant is able to show that the check is "bad" under Maryland's criminal law. The new law also eliminates the requirement that the retailer post notice of the penalties for passing bad checks.

New York's "Lemon" Arbitration Program

The New York attorney general has announced that the Attorney General's Lemon Law Arbitration Program, administered by the American Arbitration Association (AAA), now has thirteen locations around the state where arbitration hearings are conducted. Consumers pay the AAA a $200 fee, which is refunded to consumers who prevail. Although most automobile manufacturers conduct arbitration programs at no charge to the consumer, consumers are seldom awarded full refunds or replacement vehicles through these programs and these programs are often binding on the consumer. During the first five months of the New York program, 969 consumers have paid the arbitration fee and the arbitrators have reached decisions in 615 cases, 417 (approximately two-thirds) of which have been decided in the consumer's favor.

Padding Auto Repair Bills May Be Unfair Trade Practice

The South Carolina Court of Appeals recently held that the padding of auto repair bills is an unfair trade practice. *Barnes v. Jones Chevrolet Co.*, 292 S.C. App. 607, 358 S.E. 2d 156 (1987). Barnes had his damaged car repaired by defendant dealership at a cost of $3,762. After paying the bill, Barnes discovered that $968 of the bill was for parts not used and labor not done. Barnes brought a claim against Chevrolet under South Carolina's Unfair Trade Practices Act (UTPA), S.C. Code Ann. § 38–5–10 (Law. Co-op. 1976). The trial judge excluded evidence of two similar occurrences involving other padded bills and granted a directed verdict for Chevrolet. The court of appeals ruled that evidence of similar acts should be admitted when it bears on a fact to be proven. The court further found that the issue of whether the alleged unfair practice affects people other than the parties to the transaction is material to a claim brought under the UTPA, which intended to prohibit deceptive practices that affect the public interest. Based upon this finding, the court ordered a trial de novo on the UTPA claim.

Finance Company Violates Federal Laws

The Federal Trade Commission (FTC) has charged Norwest Financial, Inc., one of the largest consumer finance companies in the country, with violating the law by failing to give consumers required information when they were denied credit. Norwest makes direct consumer loans and buys consumer finance contracts from retailers. As of December 1985, it had 555 branch offices in 42 states and its outstanding loans totaled about $1.5 billion. The FTC alleges that Norwest violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (1982), and the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1682t (1982), by denying consumers' credit applications without providing written notification of the action (in violation of the ECOA), without telling applicants the reasons for denial (in violation of the ECOA), and without providing the name and address of any consumer reporting agency that supplied the report when the basis for credit denial was such a report (in violation of the FCRA).

Telemarketing Scams Abound

Reports of telemarketing scams are numerous. In Pennsylvania the attorney general has charged that companies named Telecommunications and Shoppers' Club are engaged in fraudulent marketing practices. Apparently, representatives of these companies contact consumers by telephone and offer to sell them memberships in the "Shoppers' Club" for $14.95 to $39.95. Membership entitles the consumer to a periodical publication that purportedly contains discount coupons or "gift checks" to be redeemed at local businesses. The attorney general's investigation indicates that no such publication exists.

Fraudulent marketing practices have also been alleged against a California company by the Iowa attorney general. According to the attorney general's office, the California company has been informing consumers that they have been selected to test market free "revolutionary new Yamoto Super 250 GT Motor Cycles." Consumers who receive letters notifying them of their selection are asked to phone the company within forty-eight hours to claim ownership of the motorcycle. Consumers are then telephonically informed that they have been selected by computer as people who "represent the purchasing habits of the greater United States" and that the referenced motorcycle will be introduced in the U.S. market after completion of the marketing test. Consumers are offered the motorcycle, which the company values at $1,000, for only a $394 transportation charge if they agree to test ride it for thirty days and complete an evaluation. The lawsuit requests restitution for consumers who have paid for the cycle as well as a civil penalty of $40,000. This is the first time the attorney general's office has requested a civil penalty in addition to restitution in a consumer protection case since a new law providing for civil penalties became effective in August of 1987.

The Iowa attorney general has successfully pursued National Businessman's Co-operative, a company that told consumers they had been selected to participate in a "nationwide test marketing survey" for a "PowerSport motorboat," which turned out to be a cheap inflatable raft with a battery-powered plastic motor. The consumers, who were told they could not purchase the boat but that for a $129 redemption fee they could test market it for the company, have received almost $23,000 pursuant to a settlement reached between the attorney general and the company.

A preliminary injunction has been granted by a California superior court against American Marketing Association, Inc., for comparable activities. American Marketing, which has been charging participants in a similar "test marketing survey" $273 for shipping, freight, and promotional costs, is also alleged to have sold cheap mopeds as motorcycles and has operated under the names of Global Marketing and Testing, Continental Marketing, and Western Continental Marketing. A suit with respect to similar merchandising practices has also been filed by the Texas attorney general against U.S. Merchandising (which additionally promised free vacations to Mexico).

Legal assistance attorneys are again reminded that the Federal Trade Commission (FTC) has developed a computerized system to assist it in aggressively pursuing those involved in fraudulent practices. Information regarding

such scams should be provided to the state attorney general's office or to Major Hayn, Instructor, The Judge Advocate General's School, for transmission to the FTC.

"Airplane" Pyramid Schemes

Those promoting "Airplane" pyramid schemes are being pursued by the attorney generals of New York, Pennsylvania, and Illinois for conducting unfair trade practices. Consumers who participate in these schemes typically receive "passenger seats" on mythical "airplanes" for fees ranging from $1,500 to $2,200, advancing to "flight attendant," "co-pilot," and "pilot" status by enlisting new participants. Although promoters assure consumers that upon becoming "pilots" the participants will receive between $12,000 and $17,600 from subsequently enrolled "passengers," investigations reveal that no such sums are received and that these fraudulent schemes typically violate state consumer protection laws.

Travel Clubs May Not Deliver All They Promise

Expense-paid vacations to exotic locales may be too good to be true. Club Dominium International and Resort Express have reportedly sent consumers postcards marked "Urgent," indicating that the recipient has been selected to receive an expense-paid vacation to locations such as Hawaii, London, or Tahiti. When the consumer calls to claim the prize, the consumer is required to purchase a $349 "travel club" membership and one full airfare in order to receive one "free" airfare and accommodations for two at the exotic vacation spot.

World Travel Vacation Brokers, Inc., has allegedly misled consumers about the price of an offered Hawaiian vacation, telling consumers that a payment of $29 for a travel certificate would entitle the consumer to one round-trip ticket to Hawaii. To qualify for this low airfare, consumers have been required to purchase accommodations in Hawaii through World Travel. Although World Travel represented that these accommodation rates were "discounted," the Federal Trade Commission's complaint alleges that the rates were based upon the sum of the actual cost of the airfare, based on the date and place of departure, and the actual rates for accommodations in Hawaii, minus the $29 already paid by the consumer. The complaint further alleges that World Travel falsely told consumers that their $29 payments were refundable upon cancellation within three days and that consumers who cancelled their reservations in writing would receive a refund within fourteen days.

CreditCard Travel is currently defending a suit initiated by the Missouri attorney general for making unauthorized charges to consumers' credit cards for travel club memberships. Among other allegations, the suit alleges that CreditCard failed to identify clearly the trial membership period during which consumers could cancel membership at no cost, failed to honor consumer requests for refunds, and failed to honor consumer requests to discontinue the free trial membership on the basis that consumers did not return a discontinuance notice that consumers never received.

The Washington attorney general has sued Vacation World, Inc., in the second consumer protection action brought by that state against sellers of low-cost "vacation vouchers." In Alaska, Idaho, Oregon, Washington, and Wisconsin, Vacation World sold certificates costing from $99 to $299 on the assurance that these certificates were redeemable for Mexican vacations. As with many such vacation vouchers, those who purchased the vouchers were unable to take the anticipated trips due to severe scheduling restrictions and other intentional impediments. In addition, the company neglected to inform consumers prior to their purchases that extra "deposits" and "service charges" would be required and that numerous documents had to be submitted before trip reservations could be booked. The documents included copies of marriage licenses, W–2 forms, recent paycheck stubs, and drivers licenses.

Resorts Solicit Time Shares

The list of resorts that use unfair or deceptive means to solicit consumers to purchase time share interests continues to grow. In Kentucky, the attorney general has filed a complaint against the Hideaway Hills Golf and Racquet Resort of Park City alleging that the company mailed solicitations in the form of "sweepstakes notices" to Kentucky residents. The notices informed the receivers that they had already "won" prizes, that they were national "finalists," that prior notices of "winning" had been sent, and that the prizes they had won were "major" and "valuable." The complaint alleges that none of these assertions were true.

The Illinois attorney general has sued World Wide Vacations, Inc., and World Wide Group, Inc., for using deceptive sales tactics to entice consumers to purchase shares in condominiums in Hawaii, Florida, and other vacation spots. World Wide Vacations, Inc., the time sharing company, is not related to World Wide Travel, a travel promotion company, that is also being sued by the attorney general's office.

Florida Resort Association, a firm operating in Missouri and other states, has allegedly misrepresented its "fabulous Florida vacation offer" by leading consumers to believe that they have won a prize. In fact, the firm was soliciting consumers to purchase Florida vacation packages, failing to inform consumers that the vacation would cost $89.50, and failing to comply with state law requiring that time share solicitations be approved by the attorney general's office. Major Hayn.

Tax Notes

Support Payments When Child Visits Payor

A Letter Ruling issued by the Internal Revenue Service highlights the need for careful drafting of separation agreements to ensure that support payments intended to qualify for an alimony deduction are not later characterized as nondeductible child support. (Priv. Ltr. Rul. 8,746,085 (Aug. 21, 1987)). The IRS was asked whether some portion of unallocated or lump sum support payments for an ex-wife and child should be treated as child support for tax purposes because the payments were to be reduced when the payor spouse had uninterrupted visitation with the child.

Prior to 1984, unallocated payments for the support of a spouse and child were treated as deductible alimony even if the payments were to be reduced on a change in the child's status such as reaching the age of majority, gaining employment, or leaving school. (*Commissioner v. Lester*, 366 U.S. 299 (1961)). The 1984 Domestic Relations Tax Act (Pub.

L. No. 98–369, 98 Stat. 494) changed this rule by amending section 71 of the Internal Revenue Code (I.R.C. § 71(c)(2) (West Supp. 1987)).

The Code now provides that if any amount of unallocated support will be reduced on a contingency relating to a child, an amount equal to the amount of the reduction will be treated as nondeductible child support (I.R.C. § 71(c)(2) (West Supp. 1987)). According to the Code, such contingencies are reaching a certain age, marrying, dying, and leaving school. The Temporary Federal Income Tax Regulations implementing section 71 add leaving a spouse's household as another contingency relating to the child. (Temp. Treas. Reg. § 1.71–1T(c), Q & A 17).

In Private Letter Ruling 8,746,086, the IRS concluded that, based on the Code and implementing Temporary Regulations, the amount by which payments are to be reduced during the payor spouse's uninterrupted visitation with the child constitute child support for tax purposes. Accordingly, the payor spouse may not deduct as alimony the amount of the weekly reduction multiplied by fifty-two for each tax in which the payor provides support.

The Ruling could dramatically alter the tax consequences of support payments made pursuant to a separation agreement or divorce decree. For example, assume that an agreement provides that a husband shall pay $500 per month for the support of the wife and child to be reduced by $100 for every week the husband has custody of the child. Under these facts, $100 per week or $5,200 per year ($100 multiplied by 52) will be treated as child support and will not be deductible by the payor husband. If there had been no reduction provision in the agreement, the husband could have deducted the entire annual support payments of $6,000.

Although directed only at the parties requesting it, Private Letter Ruling 8,746,085 does illustrate a potential trap for the unwary draftsman. Legal assistance attorneys should become familiar with section 71 of the Code and carefully draft all separation agreements calling for support payments that will be reduced on an event related to a child. Captain Ingold.

Tax Issues for Minor Children

Parents in high income tax brackets have often tried to shift taxes by splitting income with their children. Congress acted against this strategy in 1986 by including a provision in the Tax Reform Act of 1986 (Pub. L. No. 99–514, 100 Stat. 2085 (1986)) that requires taxing the unearned income over $1,000 of children under age fourteen at their parents' highest tax rate (I.R.C. § 1(i) (West Supp. 1987)).

The IRS has revised some of the tax rules relating to children to implement the new tax provision. A minor child must file a return this tax year if the child has unearned income over $500. In addition, all those whose gross income (earned plus unearned) exceeds the standard deduction amount of $2,540 must also file returns. (I.R.C. § 63(c)(95)(A) and I.R.C. § 6012(a)(1)(c) (West Supp. 1987)). Another rule setting the stage for increased taxation of children under fourteen is that children may not claim personal exemptions on their returns because they are eligible to be claimed as dependents by their parents. (I.R.C. § 151(f)(2) (West Supp. 1987)).

Under the new Code provisions, a child under fourteen will pay tax on unearned income over $500 at his or her own rate. A minor child's unearned income over $1,000 will be taxed at the parents' top tax rate as if it were income to the parents. (I.R.C. § 1(i) (West Supp. 1987)). This additional tax will be computed on Form 8615, *Computation of Tax for Children Under Age 14 Who Have Investment Income of More Than $1,000,* and will be reflected on the child's return, not the parents'.

Although the concept of this new tax provision is relatively simple, there are some areas that may prove to be difficult. The Treasury Department recently issued temporary regulations to provide guidance on some of the more complex features of the new rules. (*See* Note, *IRS Issues Temporary Regulations Addressing Tax On Unearned Income of Minor Children,* The Army Lawyer, Nov. 1987, at 59).

One area of the new rules that could cause difficulty is determining the child's income amount that is subject to the parents' tax rates. The tax preparer's first step is to calculate the child's unearned income that will be subject to the parental tax. All unearned income from any source is subject to the new rules. Thus, income-producing property transferred to the child before 1987, gifts from any person, trust income, and social security and pension benefits, to the extent includible in gross income, must be included when calculating the tax. (Temp. Treas. Reg. § 1.1(i)–1T, Q & A 7–9, 15, and 16).

The next step after computing the child's unearned income is to determine the "net unearned income." Net unearned income is defined as the amount by which unearned income exceeds the sum of $500 (the standard deduction amount for children in 1987) plus the greater of $500 or the sum of itemized deductions directly connected with the production of unearned income. (Temp. Treas. Reg. § 1.1(i)–1T, Q & A 6). Consequently, at least $1,000 will not be included in the child's net unearned income for 1987.

Calculating the child's tax will not be difficult if the child does not have net unearned income. The amount not included in net unearned income, but over the standard deduction amount of $500, will simply be taxed at the child's own tax rate.

If the child does have net unearned income, however, it will be difficult to compute because this amount will be subject to tax based on the child's proportionate share of the "allocable parental tax." (I.R.C. § 1(i)(3) (West Supp. 1987)). Allocable parental tax is the difference in tax on the parent's income calculated both with and without adding the total net unearned income of all children under age fourteen. The allocable parental tax must be added to the tax on the child's other income and reported on the child's income tax return (line 18, Form 1040A or line 37 on Form 1040).

The computation of taxes is even more complicated if more than one minor child has net unearned income. In this case, each child's tax liability is based on the ratio that his or her net unearned income bears to the total net unearned income on which the allocable parental tax is computed.

Determining the parental income to be used in computing the allocable parental tax is easy for children who have

only one living parent and for children whose parents file a joint return. The sole surviving spouse's income, or the total taxable income on the parents' joint return, is the figure to be used for determining the allocable parental tax. If the child's parents are married but file separate returns, the allocable parental tax should be based on the income of the parent having the greater taxable income. (Treas. Reg § 1.1(i)–1T(5)(A)). The income of the child's custodial parent should be used to compute the tax if the parents are separated or divorced. (*See* I.R.C. § 152(e) (West Supp. 1987) for rules on determining the custodial parent.).

The addition of a child's net unearned income to the parents' taxable income for purposes of determining the child's tax liability in no way affects the tax liability or computation of credits taken by the parents. For example, the two percent floor on miscellaneous itemized deductions will not be affected by the net unearned income of a minor child. (Temp. Treas. Reg. § 1.1(i)–1T, Q & A 21).

Minor children who are subject to the new tax rules must report their parents' taxpayer identification numbers on their returns. (I.R.C. § 1(i)(6) (West Supp. 1987)). Parents have a corresponding obligation to report on their returns the taxpayer identification numbers of their dependent children who are over five years of age.

Although the strategy of shifting income to children is not as attractive under the new rules, some methods of "sheltering" income remain. One obvious method is merely to wait until a child has attained the age of fourteen to transfer gifts or income producing assets to the child because children over fourteen are not subject to the allocable parental tax. The parental tax also will not apply to unearned income up to $1,000, so tax savings may also be generated by transferring income below this amount to children under fourteen.

Taxpayers should review investment plans for their children in light of the new tax rules for minor children. For example, parents who have purchased Series EE savings bonds may find it more beneficial to declare total interest on the bonds when they are redeemed instead of declaring interest annually. Parents should also consider transferring property that produces little or no income, but is expected to appreciate in value, to minor children. If the property is not sold until after the child reaches the age of fourteen, the realized gain will be taxed at the child's lower tax rate. Captain Ingold.

Deducting Moving Expenses Under the Tax Reform Act of 1986

Prior to 1987, taxpayers could deduct unreimbursed moving expenses as adjustments to income without itemizing deductions. This "above the line" treatment of moving expenses under pre-1987 law was also valuable to itemizers because, by reducing adjusted gross income by deducting moving expenses, a taxpayer could lower the floor upon which deductions and credits were based.

As a result of the 1986 Tax Reform Act, moving expenses can only be taken if they are an itemized deduction beginning with tax year 1987. (I.R.C. § 62(a)(8) as amended by 1986 Act § 132(c)). Moving expenses will not, however, be included in the miscellaneous itemized deductions subject to the two percent floor of adjusted gross income. (I.R.C. § 62(a)(2)(A)). Consequently, an itemizer will be able to fully deduct all qualifying, unreimbursed moving expenses.

Although it modified the method for claiming the deduction, the 1986 Act did not change the rules regarding what moving expenses are deductible by military personnel. Active duty soldiers can deduct moving expenses incurred as a result of a permanent change of station (PCS). The term "permanent change of station" includes ordinary transfers from one duty station to another, a move from home to the first station on active duty, and a move from the last post of duty to home. (Treas. Reg. § 1.217–2(g)(3)). A move by a member of the armed forces can qualify for the deduction regardless of the distance moved or the length of time the member works at the new station. (I.R.C. § 217(g) (West Supp. 1987)).

Members of the armed forces need not include in gross income cash reimbursements or allowances paid to defray moving expenses to the extent of moving and storage expenses actually paid by the member. (I.R.C. § 217(g) (West Supp. 1987)). All moving and storage expenses paid or provided for by the government are excludible from gross income.

The moving expense deduction includes all expenses that are reasonable under the circumstances of the move and that exceed allowances or reimbursements provided to the member. Deductible items include direct expenses such as the reasonable out-of-pocket expenses of moving personal effects and household goods as well as the cost of travel, including meals and lodging in transit (I.R.C. § 217(b)). A new rule taking effect this year, however, limits deductions for meals to eighty percent of the actual cost. (I.R.C. § 274(n)(1) as amended by 1986 Act S 142(b)).

Soldiers may also deduct indirect moving expenses. Examples of these expenses include pre-move house-hunting trip costs, temporary lodging expenses, and the cost of selling a former residence or buying or renting a new home. (I.R.C. § 217(b)(1)(C) and (D) (West Supp. 1987)). A member may not, however, elect to claim the expense of buying or selling a home both as a moving expense and as an adjustment to basis on Form 2119, *Sale or Exchange of Principal Residence.*

The Internal Revenue Service has released two new forms to report the moving expense deduction. Form 3903, *Moving Expenses,* should be used by taxpayers moving to new stations within the United States or its possessions. Soldiers who are moving to duty stations outside the United States or its possessions must use Form 3903F, *Foreign Moving Expenses,* to report their moving expenses. Captain Ingold.

Family Law Notes

Two Bites at the Apple

Suppose you are representing a soldier in a marital dissolution matter, and the mission at hand is to negotiate a separation agreement that maximizes preservation of your client's interest in his military retired pay. The parties have been married for all of the soldier's ten years on active duty. After exploratory discussions it appears that the spouse will sell her interest in retired pay for $15,000, a sum your client can pay because of a recent inheritance. The only other sticky point is alimony—under state law the court

must reserve jurisdiction on this issue due to the length of the marriage. Of course, your client wants to minimize his exposure to this obligation.

Eventually, you and opposing counsel settle upon a separation agreement that includes the following provisions.

1. Equitable Distribution of Property.

a. All marital property will be equally divided between the parties except as provided in the next subparagraph.

b. The Husband shall pay to the Wife immediately upon the execution of this agreement the sum of $15,000 from his separate property, in consideration for which the Wife hereby waives her rights to the Husband's military pension.

2. Alimony. The Husband shall pay to the Wife alimony in the sum of $300 per month, said sum not to be increased at any time due to any increase in the Husband's income.

You and your client conclude that these clauses leave him in pretty good shape. He retains all of his retired pay, and at least there is a cap on the alimony he must pay. Moreover, when he does retire, he will have no income from which to pay alimony, so the obligation should terminate at this point.

Not so fast. The recent case of *Staver v. Staver*, 217 N.J. Super. 541, 526 A.2d 290 (1987), demonstrates difficulties with this carefully crafted plan. Let's look down the road twenty-one years and see what can happen. Your client retires after thirty years of active duty service with a military pension of $3,100 per month. His former wife, in the meantime, has suffered declining health and become impecunious, eking out a meager living on the alimony plus social security payments of $350 per month.

Nonetheless, your client wants to stop paying her, so he initiates an action to reduce the alimony, based on changed economic circumstances. After all, the former wife has waived her interest in the military retirement pay, and as this pay is now his only source of income, there is no money to meet the alimony obligation. She resists his effort and countersues for an increase in alimony based on her poor health and dismal financial condition.

Can she win? At first glance it may seem unfair for her to receive alimony that must be paid out of retired pay. This would result in "double dipping" because she already received $15,000 in exchange for her interest in this source of funds. Yet, the parties' relative financial positions make it hard for a court to cut off the flow of $300 that the former wife so desperately needs.

Confronted with just such a dilemma in a case involving a civilian pension, the New Jersey court closely examined the facts and "discovered" a solution. It is true that the wife surrendered her interest in the marital property aspect of retired pay, but she did so at the time of divorce, which in our hypothetical happened twenty years ago. Thus, she had no marital property interest in retired pay earned after the divorce, and the waiver therefore does not apply to the soldier's monthly retirement benefits that are attributable to the latter portion of his career. With this reasoning, the court concluded that some of the retired pay could be considered in setting the amount of alimony.

The concept here may be straightforward, but the calculations can be complex. The New Jersey court ordered that an expert be appointed to determine what portion of retired pay is attributable to employment after the effective date of the former wife's waiver. Interestingly, this places the soldier in the unusual position of wanting to "frontload" his retirement benefits—he wants as much as possible apportioned to the early years of his service, those that are covered by the former wife's waiver.

One way to achieve this is to attribute the retired pay equally to each year of active service. Thus, in the instant case, one-third of the monthly benefit would be sheltered from consideration in setting alimony. This may not appear to accomplish much, but the alternative is worse. The former spouse is likely to argue that the appropriate formulation must account for the impact on retirement pay occasioned by advancements in rank that occurred after the divorce. The effect of this approach would be to significantly reduce the portion of retired pay attributable to the first ten years of active duty, served in lower ranks.

Clearly, once a court accepts the basic premise in the *Staver* case, the retiree is placed in a position of reducing his losses. There is one argument favorable to the retiree that may not have been considered by the *Staver* court, however. The conclusion that retired pay constitutes *income* to be weighed in setting alimony is inconsistent with the parties' prior treatment of this asset as property. Unfortunately, this position does not mandate a judgment for the soldier, but it is a consideration that might sway another court to conclude that, once it is treated as property, retired pay cannot thereafter be converted to income for other purposes. A victory on this point is not necessarily a win, however, because some states factor property as well as income into the alimony equation.

As for the former wife's request for an increase in alimony, remember that alimony is a matter of equity. Courts look to need and ability to pay, keeping in mind also the goal of reducing the number of people on public assistance. Thus, the wife could come out of the litigation with more money, not less, depending on the amount of retired pay the court finds to be subject to alimony. The retiree may have been well advised to leave the matter alone.

The best question to ask is how this whole problem can be avoided, and the starting point is an examination of how the issue arises. Three elements must occur—some settlement of division of retired pay; active service before the marriage or after the divorce; and an actual or potential alimony obligation existing or arising after retirement. The answer seems to lie in the drafting of separation agreements. Counsel representing the soldier should strive to include specific waiver language making it clear that the portion of retired pay the spouse receives under the agreement constitutes his or her sole entitlement to this asset. Clarify that the parties intend that retired pay be treated for all purposes solely as property and that, in consideration for all the property and support provisions in the agreement, the spouse expressly waives any award or increase of alimony based on the soldier's receipt of retired pay.

On the other hand, counsel representing spouses must be aware that such language waives what could become an important entitlement for their clients. Negotiations should take this fact into account. Major Guilford.

Arizona Child Support Guidelines

Arizona has promulgated statewide child support guidelines as required by the federal Child Support Enforcement Amendments of 1984. Reports from practitioners in Phoenix indicate that judges are taking the guidelines seriously. Separation agreements must have a copy of the worksheet attached before most judges will review them, and judgments that deviate from the amount of support called for by the guidelines must be supported by specific findings. Thus, if the parties agree to a lesser amount of support, the agreement should include cogent reasons for this result. Otherwise, the court is likely to enter an order calling for the guideline amounts.

Another significant change in Arizona's child support procedures is the adoption of mandatory wage assignments for child support payments, effective January 1, 1988. All dissolutions (if the parties have minor children) and support modifications issued after that date must include a wage assignment provision. This means that soldiers subject to Arizona decrees will automatically have child support payments deducted from their military pay, whether or not any arrearage has developed.

Soldiers who are waiting for an Arizona decree to be issued probably should pay interim support by check until they verify that the wage assignment is in effect (this will be reflected on the LES). If they are paying by allotment when the order becomes effective, a double deduction for support may occur—one based on the wage assignment order and the other based on the allotment, at least until the soldier cancels the allotment. Major Guilford.

Claims Report

United States Army Claims Service

Article 139 and the Victim and Witness Protection Act of 1982

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Article 319 of the Uniform Code of Military Justice[1] is an anomaly in the military claims system: unlike other claims statutes that provide a mechanism to administratively settle claims by and against the government,[2] Article 139 allows a commander to involuntarily reimburse the victim of a crime directly from the offender's military pay.[3] In effect, it provides for governmental righting of a private wrong. In one sense, Article 139 is a dragonfly set in amber, a relic of a historical era when soldiers were billeted in private homes and the sovereign was immune from suit; in another, it is a modern and essential cog in the Army's implementation of the Victim and Witness Protection Act of 1982,[4] and can play a vital role in addressing the concept of victim protection.

The distinction between Article 139 and other claims statutes is rooted in the maintenance of military discipline. The Article affords protection from riotous, violent, or disorderly conduct or theft on the part of soldiers by requiring the commander to provide recompense for property "wrongfully taken" or "willfully damaged" by a soldier. Long before the civil courts expanded the scope of the Bill of Rights, however, the predecessor to Article 139 in the Articles of War was declared "an unusual and

[1] 10 U.S.C. 939 (1982) [hereinafter UCMJ], as implemented by chapter 9, Dep't of Army, Reg. No. 27-20, Legal Services—Claims (10 July 1987) [hereinafter AR 27-20].

Article 139 provides as follows:

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for purposes of that investigation, it has the power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time that the damages complained of were inflicted, as determined by the approved findings of the board.

[2] *See, e.g.*, Dep't of Army, Pamphlet No. 27-162, Legal Services—Claims, paras 1-3, 1-4 (15 Dec. 1984).

[3] The Article 139 process begins when a victim presents a claim against a soldier. The officer receiving the claim must forward it within two working days to the Special Courts-Martial Convening Authority (SPCMCA), who must appoint an officer to investigate it within four working days. The investigating officer provides the soldier with notice and an opportunity to respond, investigates the matter, and presents the SPCMCA with findings and recommendations within 10 working days. The claims office must review the recommendation for legal sufficiency within five working days. The SPCMCA may then approve the claim, notifying both the claimant and the soldier and allowing them 10 days to request reconsideration before directing the servicing finance officer to withhold pay from the soldier and pay it to the claimant, unless the soldier is likely to have no pay to withhold if this step is delayed. A copy of the completed action is forwarded through the claims office to U.S. Army Claims Service. *See also* Guidebook for Article 139 Claims, app. G, Personnel Claims Adjudication, U.S. Army Claims Service Claims Manual (1985) [hereinafter Claims Manual].

[4] Pub. L. No. 97-291, 96 Stat. 1249 (1982) (codified as amended in scattered sections of 18 U.S.C.).

extraordinary remedy, repugnant to the usual methods of establishing civil liability," and narrowly construed to only afford redress to victims of such offenses.[5]

The Article had its genesis in Article V, Section IX of the British Articles of War of 1765, which was adopted by the nascent American Army as Article XII of the American Articles of War in 1775 and modified over two centuries.[6] Although Article V of Section IX was only applicable to offenses committed against persons with whom soldiers were billeted and to "disturbing Fairs of Markets, or . . . committing any kind of Riot," Article XII applied to all abuses or disorders in quarters or on a march.[7]

As the American Army evolved, the Article expanded gradually to allow claims by individuals and soldiers for wrongful takings and willful damagings, although provisions that allowed compensation for bodily assault and made it a criminal offense for a commander to refuse to comply with its injunctions fell away.[8] A "wrongful taking" is presently defined as "any unauthorized taking or withholding of property, not involving the breach of a contractual or fiduciary relationship, with the intent to deprive the owner or the person in lawful possession of the property."[9] A "willful damaging" is defined as

> damage which is inflicted intentionally, knowingly, and purposefully, without justifiable excuse, as distinguished from damage caused inadvertently or thoughtlessly through simple or gross negligence. Damage, loss or destruction of property caused by riotous, violent, or disorderly acts, or by acts or depredation, or through conduct showing reckless or wanton disregard for the property rights of others may be considered willful damage.[10]

Any person, business entity, state or local government, or charity may presently claim under Article 139;[11] the United States and its appropriated or non-appropriated fund entities may not.[12]

It is occasionally suggested that Article 139 be expanded beyond its historically defined parameters, either by redefining a "wrongful taking" to include incidents that arise out of a breach of a contractual or fiduciary relationship, or by treating "grossly negligent" conduct as willful damage with the aid of hair-fine distinctions between simple and gross negligence.[13] "Wrongful takings" and "willful damagings" may not be viewed in a vacuum. Article 139 is a mechanism for providing restitution for the victims of *criminal* offenses, a reason for its inclusion in the UCMJ. Its purpose is to promote military discipline and preserve the civil or military community from these types of disorders.

The Army has no interest in mediating business disputes under the guise of preventing theft, nor is the Army a debt collector. Article 139 is not intended to operate as a general system of indemnification.[14] Problems that arise in connection with property purchased under a contract of sale or borrowed property cannot legitimately be considered essential to the maintenance of military discipline.[15]

Further, The Army has less interest in adjudicating a claim that a soldier inadvertently damaged property, regardless of the degree of negligence displayed. The first Manual for Courts-Martial explicitly stated that Article 139 is the administrative remedy for damage to or loss of property resulting from offenses denounced in Article 109: wasting, spoiling, or destroying private property.[16] The present definition focuses not on whether the damage resulted from simple or gross negligence, but whether it

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[5] *See* Dig. Ops. JAG 1912–1940 sec. 463(2) (5 Mar. 1928).

[6] W. Winthrop, Military Law and Precedents 657 (2d ed. 1920).

[7] *Compare* Article V, Section IX, British Articles of War of 1765, *reprinted in* Winthrop, *supra* note 6, at 939 *with* Article XII, American Articles of War of 1775, *reprinted in* Winthrop, *id.* at 954.

[8] *See generally* W. Winthrop, *supra* note 6, at 657–58.

[9] AR 27–20, para. 9–4*b*. Note that this prohibition on claims involving breach of a contractual or fiduciary relationship applies to wrongful takings, not to willful damagings. If a soldier deliberately uses a sledgehammer to smash a hole in a wall of the house he is renting, the landlord may obtain redress under Article 139 for this particular damage, although the landlord would not be entitled to have a claim for rent or other monies due under the rental contract considered.

[10] AR 27–20, para 9–4*a*.

[11] *Id.* para. 9–2.

[12] The statute speaks in terms of "any person," which excludes claims by the United States and its instrumentalities; an opinion by the Administrative Law Division, OTJAG, DAJA–AL 1976/3630, 15 Jan. 1976, further holds that the United States has no right of subrogation if it compensates the victim, relying upon the authority of United States v. Gilman, 347 U.S. 507 (1954) (case declined to find a right of subrogation where one was not expressly granted under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (1982)), and an earlier opinion, JAGA 1955/10292, 23 Dec. 1955 (applying the same rationale to the Foreign Claims Act, 10 U.S.C. § 2734 (1982)). *See also* W. Winthrop, *supra* note 6, at 658 n.66.

[13] *See e.g.*, McClelland, *Article 139: A Remedy for Victims of Soldier Misconduct*, The Army Lawyer, Aug. 1985, at 21.

[14] Two relatively recent cases that cite Article 139, United States v. Jaffee, 663 F.2d 1226, 1259 (3d Cir. 1981), and United States v. Brown, 4 M.J. 654, 656 (A.C.M.R. 1977), do so with approval. Article 139 represents a striking grant of quasi-judicial authority to someone who is not a judge within the meaning of article III of the United States Constitution, however, and the provision that allows the commander to hold individuals who were present at the scene responsible as joint tort-feasors when the actual perpetrator cannot be identified is extraordinary. Article 139 confers upon commanders a summary authority that is quite exceptional in our law. W. Winthrop, *supra* note 6, at 660. The constitutionality of Article 139 is grounded in the special circumstances of military discipline the Supreme Court has acknowledged in decisions such as Feres v. United States, 340 U.S. 135 (1950).

[15] The Army has no interest in regulating conflict over a contractual or fiduciary relationship under Article 139 unless the relationship is merely a cloak for an intent to steal. For example, a claim that a soldier borrowed a friend's video tape recorder to tape a show and did not return it on the promised date is not cognizable, unless the soldier borrowed the VCR on a pretext and immediately sold it to a third party, evidencing a present intent to steal. A claim arising from the fraudulent use of a stolen check or credit card is cognizable under Article 139. Within the Army, a claim that a soldier uttered a worthless check is cognizable when evidence establishes an intent to defraud; as with Article 123a, UCMJ, an intent to defraud my be inferred when the soldier fails to make good on a bad check within five working days after receiving notice of insufficient funds. The Office of the General Counsel of the Air Force has taken a contrary position on worthless check claims, however.

[16] Manual for Courts-Martial, United States, 1951, app. 2, at 452.

resulted from riotous, violent, or disorderly conduct. Article 139 cannot be construed to afford recompense for negligent acts that do not involve this type of conduct.[17]

Two examples illustrate the principles involved. If a soldier accidentally bumped into and broke a lamp in the course of a drunken brawl, even though he did not specifically intend to break the lamp and could characterize his act as simple negligence, his conduct was riotous and a claim against him by the owner of the lamp would be cognizable under Article 139. If, however, the same soldier drove his car at eighty miles an hour down the highway and drifted over the center line into an on-coming vehicle, a claim against him would not be cognizable under Article 139, even though his conduct may be characterized as grossly negligent. Only damage that is "incidental to violence against the person or the outgrowth of a breach of the peace," may be regarded as within the spirit of the Article.[18]

Within these accepted, limited parameters, greater use of Article 139 is desirable, but several hurdles have to be overcome. Potential claimants are rarely informed of their right to seek redress under Article 139 or even of the offender's identity until the offender has been court-martialed or administratively eliminated from the service and no longer has military pay to attach. Delays in processing Article 139 claims exacerbate this problem and often result in no action being taken. Some commands have even been known to delay processing an Article 139 claim until after an offender has been court-martialed on the mistaken theory that a finding of guilt by the panel will avoid any possibility that the commander will erroneously impose liability. Instead, in practice this merely results in ending any possibility that the victim will be compensated. Soldiers are required to receive instruction concerning Article 139,[19] but this tends to be so abbreviated as to be nonexistent. As a rule, on installations with large soldier populations, the use of Article 139 is directly proportionate to the interest the staff judge advocate (SJA) takes in promoting the program.[20] Where the SJA does not promote the program, the salutary goals of the Victim and Witness Protection Act of 1982 are not achieved.

In passing the Victims and Witness Protection Act of 1982, Congress found and declared that "[w]ithout the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders," and that "[a]ll too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victims."[21] As part of the legislative history of the Act, Senate Report No. 97–532 states baldly that

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being. . . .[22]

Accordingly, the federal criminal courts are empowered to order restitution and directed to explain on the record if they fail to do so.[23]

In the Army, the Act is implemented by the Victim/Witness Assistance Program.[24] Article 139, although limited in scope, is the only means of involuntary restitution available to an individual victim within the military system and is specifically identified in the Program as the Army's mechanism to accomplish this goal of restitution.[25] To the extent that Article 139 is ignored, this "integral part" of the Program is lacking.

The Claims Office has the role of overseeing the installation Article 139 program and monitoring the time suspenses that paragraphs 9–7, Army Regulation 27–20 imposes on all persons involved in processing Article 139 claims.[26] To use Article 139, however, the victims must know of the program. Within the military system, victims come into contact with commanders, trial counsel, the military police, and the Criminal Investigation Division (CID). To create an effective Article 139 program, the claims office must educate and obtain assistance from these individuals. At a minimum, they must be familiar with both Article 139 and the Victim/Witness Assistance Program and be prepared to do the following for victims whose property is stolen or vandalized: to inform the victim that he or she has the right to submit an claim for restitution under Article 139 to the claims office if a soldier or soldiers committed the offense; to inform the victim of the identity of the offender if the victim is unaware of the identity of the

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[17] The present version of AR 27–20, para. 9–4*a* clarifies the definition of willful damage by the addition of the language previously found in paragraph 9–5*a* limiting the application of Article 139 to damage caused by riotous, violent, or disorderly conduct, or acts of depredation, and by the addition of language distinguishing damage that is caused thoughtlessly or inadvertantly by *gross* negligence.

[18] *Cf.* W. Winthrop, *supra* note 6, at 658.

[19] UCMJ art. 137; Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 19–4 (1 July 1984) (c4, 10 July 1987) [hereinafter AR 27–10].

[20] Currently, the most effective Article 139 program is at Fort Riley, Kansas, where the SJA has taken a very active role.

[21] 18 U.S.C. § 1512 note (1982).

[22] S. Rep. No. 97–532, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2536 [hereinafter S. Rep. No. 97–532].

[23] *See* Pub. L. No. 97–291, § 5(a), 96 Stat. 1248, 1253 (1982) (amending 18 U.S.C. § 3579 (1982)).

[24] AR 27–10, para. 18–1.

[25] *Id.*, para. 18–12*b*.

[26] *See* Claims Manual, Personnel Claims Adjudication, app. G, at 3–6 (1987).

offender;[27] to inform the victim that the Victim/Witness Liaison (VWL) is the point of contact for obtaining information concerning and securing victim/witness services;[28] and to inform both the VWL and the claims office if an offender is later identified.

The VWL and claims office in turn must be prepared to give victims detailed guidance about Article 139. The VWL must be prepared to inform a victim if a subject is later identified. The claims office must question every victim of theft or vandalism to discover whether the offender is known; if the offender is known and amenable to process under Article 139, the claimant should be assisted in preparing a claim under Article 139 rather than a claim against the government.[29] The claims office must then make every effort to ensure that the Article 139 claim is processed expeditiously.

In summation, to the victim of a "wrongful taking" or "willful damaging," the military justice system often seems remote and unresponsive. Vindication, in the form of trial and punishment of the offender, occurs months or sometimes years later and represents a hollow victory if the victim ends up bearing the cost. Every time a victim is not encouraged to request restitution, an offender is being relieved of a part of his or her "debt to society." To the extent that the victim must be reimbursed by an insurer or the government for such a loss,[30] insurance companies and the insurance-buying public, or the public at large, are being asked to pay off the offender's debt.[31]

Article 139, therefore, is not a mere anachronism, but rather a necessary means for the commander to do justice. Insofar as the military justice system is primarily focused upon enforcing the right of the government to punish an offender for a breach of military discipline, Article 139 adds a necessary balance in enforcing the rights of the victim. In a sense, we have come a full circle in two hundred years. Concerns over compensating victims of crimes committed by soldiers that were important to Washington's army are once again seen to have greater importance, giving Article 139 new life and meaning in the Army of today.

Tort Claims Division—Breaking the Code

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Prior to my assignment at the U.S. Army Claims Service (USARCS), I had only hazy notions of the USARCS organization and the types of work performed. From conversations with other judge advocates, it appears they too were unfamiliar with the mission, functions, and organization of USARCS. Compounding this situation was an internal reorganization at USARCS effective 13 July 1987. (*See* Lane, *The Army Claims Service Gets a Facelift*, in The Army Lawyer, Sept. 1987, at 66.) This note is intended to acquaint judge advocates with the current organization of the Tort Claims Division, USARCS, and to provide an overview of its mission and operations.

The Tort Claims Division consists of seventeen attorneys, a warrant officer, and seven claims investigators, divided into an office of the chief, the CONUS Torts Branch, the Medical Malpractice Branch, the Special Claims Branch, and the Operations and Records Branch. The total division caseload is about 1450 claims.

The CONUS Torts Branch consists of eight attorneys and four investigators and is generally responsible for the processing, adjudication, and settlement of claims brought under the Federal Tort Claims Act (FTCA), and, if arising within CONUS, the Military Claims Act (MCA). Each of the seven action attorneys has a geographic region for which he or she is responsible. Among the most important of their responsibilities is establishing a close working relationship with the claims attorneys at each of the JAGC and Corps of Engineer offices located within their geographic regions. They also must frequently deal with National Guard units on claims involving Guardsmen performing training and, on occasion, coordinate with local Assistant U.S. Attorneys to determine the value of damages in a claim and what his or her feelings are on trying a case or settling it within his or her authority if USARCS denies the claim. Finally, the action attorneys must routinely prepare memoranda for the Department of Justice for FTCA claims or for The Judge Advocate General or the Assistant Secretary of the Army (Financial Management) for MCA claims settlements exceeding specified amounts. Of the approximately 850 cases on hand in the CONUS Torts Branch, nearly seventy-five percent involve medical malpractice or motor vehicle accident personal injury claims. Thus, the attorneys must be fully knowledgeable of general tort law principles and medical terminology as well as the statutory and decisional law in each of the jurisdictions in their area of geographic responsibility.

The Medical Malpractice Branch is responsible solely for medical malpractice claims. Due to the volume of these claims and the lack of assets available to meet the workload, however, this branch considers only medical malpractice claims arising at the eight medical centers with an assigned medical claims judge advocate, and those arising in oversea areas where the Army has single service

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[27] Many law enforcement personnel believe that the Privacy Act, 5 U.S.C. § 552a (1974), prohibits telling the victim of a crime the identity of the offender. This is utterly inconsistent with the thrust of the Victim and Witness Protection Act. The Privacy Act is only applicable to release of information contained in a system of records. While it can be construed to limit the victim's access after the offender's name has been incorporated into a Military Police or CID report, the victim assuredly has the right to invoke the Freedom of Information Act, 5 U.S.C. § 552 (1974), and under any reasonable application of the "balancing test" between the victim's need to know and the offender's right to keep his name private, the victim must prevail. It is probably an oversight that Army regulations do not presently mention release of information to the victim as a "routine use" of these reports. *See* Dep't of Army, Reg. No. 340-21-1, Office Management—The Army Privacy Program—System Notices and Exemption Rules (16 Dec. 1985).

[28] AR 27-10, para. 18-7, requires the SJA to designate one or more Victim/Witness Liaison Officers to provide these services.

[29] *See* AR 27-20, para. 11-2*d*.

[30] A soldier or civilian employee whose property is stolen or vandalized incident to service may present a claim under the provisions of 31 U.S.C. § 3721 (1982), as implemented by AR 27-20, chap. 11. Under some circumstances, a foreign national whose property is stolen or vandalized may present a claim under the provisions of the Foreign Claims Act, 10 U.S.C. § 2734 (1982), as implemented by AR 27-20, chap. 10. Consideration must first be given to settling such claims under Article 139.

[31] *Cf.* S. Rep. No. 97-532, *supra* note 22, at 2537, which makes this argument forcefully.

claims responsibility. As Army medical centers generally treat severely injured or seriously ill patients, the claims in this branch routinely involve high dollar values and frequently require the preparation of highly sophisticated structured settlements to meet the needs of an injured claimant. The three attorneys and two investigators are currently handling about 475 claims, although the medical claims judge advocates and medical claims investigators at the medical centers are an invaluable resource in the proper investigation and adjudication of these claims. The attorneys in the Medical Malpractice Branch require substantial experience with medical terminology and disease processes, and the skill to negotiate with attorneys and families to create structured settlements that meet the needs of the patient or survivor and protect the financial interests of the United States. We are fortunate that two of the attorneys are former medical claims judge advocates and the third has extensive medical malpractice experience.

The Special Claims Branch has generally assumed the functions of the former Foreign and Maritime Claims Division. Three attorneys and one investigator handle claims arising overseas under the MCA, supervise the administration of claims under Article VIII of the NATO SOFA, adjudicate maritime claims under chapter 8, AR 27–20, and oversee operations under the Foreign Claims Act. Also, because of the difficulties alluded to above in the investigation of medical malpractice claims arising overseas, the Special Claims Branch workload of 118 claims still has about seventy malpractice claims pending resolution.

The chief's office consists of the chief, deputy, and a special projects officer, who drafts denials in claims where governmental liability clearly does not exist, and who adjudicates NAFI, U.S. Postal Service, and Industrial Security claims. The Operations and Records Branch is the glue that holds the division together by accounting for and tracking the claims through the system.

In summary, the work at Tort Claims Division is challenging and requires sound grounding in general tort law principles, coupled with the ability to perform accurate legal research, assess damages, negotiate a claim aggressively, and understand economic theories and practicalities in constructing structured settlements. Attorneys here need strong writing skills because they prepare memoranda for the Department of Justice and senior officials on the Army staff. Judge advocates with an interest in honing these lawering skills should seek an assignment at USARCS or in field offices where tort claims are a prominent part of the practice.

CONUS Claims Assistance Visit Program

Personnel Claims and Recovery Division

Purpose and Philosophy

In 1981, the United States Army Claims Service (USARCS) Commander initiated a claims assistance visit program to emphasize administrative uniformity within CONUS claims offices. This was done to help staff judge advocates (SJA) more effectively manage their claims offices, to help share successful means of time/work management among offices, and to ensure that claimants were given the same quality of service throughout the Army. Visits are scheduled in response to requests from field offices or after review of field office operations where needs may be identified for assistance. The Chief, Personnel Claims and Recovery Division will schedule all visits with the SJA concerned.

These visits are informal, and the emphasis is on assistance rather than inspection. A trip report is prepared after each visit, reflecting the reviewer's observations, recommending areas needing improvement, and noting procedures working particularly well; a copy is provided to the office visited. These reports are maintained by the Chief, Personnel Claims Branch, and are utilized for program analysis. Additionally, information from these reports may be provided to OTJAG for use on Article 6 visits.

The new claims regulation designates Area Claims Offices, which are given a technical supervisory role with respect to Claims Processing Offices in their areas. The CONUS Claims Assistance Visit Program conducted by USARCS will focus on providing assistance to Area Claims Offices, which in turn will provide evaluation and assistance to their subordinate Claims Processing Offices.

Areas Examined

During a claims assistance visit, the team of USARCS personnel will examine operations in the following areas:

—Compliance with regulatory requirements.

—Compliance with USARCS guidance.

—Logistical Support.

—Physical Plant.

—Administration.

—Adjudication.

—Recovery.

—Affirmative Claims.

—Workload and Personnel.

Appendix A outlines the specific issues that may be addressed during an assistance visit. At least one week before a visit is conducted, the team chief will brief the Chief, Personnel Claims and Recovery Division and the Commander on specific areas of concern to be addressed, and will advise the claims judge advocate of the office to be visited of these areas of concern.

Determination of Assistance Teams

Personnel. The following personnel will be trained and familiarized for participation in claims assistance visits.

Primary:

Chief, Personnel Claims Branch

Attorney Advisor, Personnel Claims Branch

Chief, Affirmative Claims Branch

Legal Technician, Affirmative Claims Branch

Attorney Advisor, Personnel Claims Recovery Branch

Paralegal Specialists, Personnel Claims Recovery Branch

General Claims Examiner, Personnel Claims and Recovery Division

Alternates:

Chief, Personnel Claims and Recovery Division

Attorney Advisor, Personnel Claims and Recovery Division

Chief, Personnel Claims Recovery Branch

Tailoring assistance teams. Based upon the specific characteristics of a claims office and the reasons for the visit, individuals composing the team will be designated by the Chief, Personnel Claims and Recovery Division according to areas of expertise and specialization. The determination as to the emphasis in certain areas will be achieved by a pre-visit analysis of an office's performance indicators and noted requirements. The team chief will be a judge advocate.

Tort claims. The Chief, Tort Claims Division, will be provided with notice of all planned visits. If the need exists, he may detail an attorney to accompany the team to provide assistance on tort claims issues.

Annual Planning

A Claims Assistance Visit Planning Committee will be designated by the Chief, Personnel Claims and Recovery Division to make an annual assessment of field offices and establish a proposed visit list for the next fiscal year. Appendix B lists criterion for evaluating claims office performance and assistance needs. The plan will be submitted to the Commander with projected scheduling requirements and estimated costs. A quarterly update regarding this projection will also be submitted to the Commander to outline the visits completed and any proposed changes.

Appendix A

Claims Assistance Visit Worksheet

1. Site of Visit. (Include distance/directions/any data helpful in locating installations). SJA--under what command?

2. Personnel. Get a copy of TDA (claims) and all civilian job descriptions.

Name/Grade/Job Title	How long at this claims office?	Amount and location of prior claims experience

Personnel Remarks--Any particular problems or acknowledgement (Certificate of Achievement record (potential); level of experience of personnel).

3. Training.

4. Workload.
   a. Claims this FY _____ Number Received.
   b. Claims last FY _____ Number Received.
   c. Breakdown by type of claim.
   d. Affirmative claims statistics.

5. Physical Plant. Describe claims office--where in location to the rest of SJA office, private office(s) for adjudicator(s), equipment.

6. Administration.
   a. Log. Separated by FY and by claim type? _____ Processing times noted? _____ Reviewed? _____ When and by whom _____ Average processing time _____ Check log, find oldest files. Review for reason file not completed and noted in log. Check log against claims files. Check "Date Received" column for indication of holding without logging.

   b. Claims Files. Pull several at random and check:
      (1) Chronology sheets/date logged in/stamped in.
      (2) How they are filed?
      (3) Discuss and explain memo for filing.
      (4) How and where are the GIR's filed?

   c. Inprocessing.
      (1) How do claimants get forms?
      (2) What about potential claimants?
      (3) Get/give copy of chapter 11 Instruction Sheet.
      (4) When are files logged in? (once daily, as received, alternate days)

   d. Small Claims Procedure. Is there one?
      (1) Appointments or walk-in?
      (2) Small claims person?
      (3) Interviewer knowledgeable?

(4) Discuss appointments/closings/publicity in post bulletin.

e. Letter to Claimant Explaining Reduced Award.

f. Policy Files

7. Installation Support
a. Finance. Cash pay? Hand carry?
b. Response time on comeback copies?
c. Transportation.

(1) How and when do they inspect?
How and how often do they send GIR's to claims office?
(2) Has anyone from claims office observed outbound counseling? (Need to do this to ensure correct guidance is given re $25,000 maximum, category limitations, insurance.)

d. Relationship with medical treatment facility--is there a risk management program?

8. Recovery.
a. How many on hand? _____ Local? _____ To be forwarded to USARCS? _____ How filed?
b. Who initiates and monitors local recoveries?
c. How responsive is contracting office?
d. Particular problems?

9. Supervisory. Level of involvement by CJA, SJA. Does CJA have any other major duties (e.g., magistrate court, legal assistance)? Degree of SJA support?

10. Are survey sheets disseminated to determine client satisfaction and to measure quality control?

11. Automation. Are new cases entered on a daily basis? Is the office editing files as new actions take place? Is the office taking status "snap shots" at close of business on the last day of each month for SJA report purposes? Is the office forwarding software disks with the SJA report to USARCS as soon as possible after the close of each month? Do claims personnel know how to use all programs? What is the depth of expertise?

12. Affirmative Claims Program.
a. Personnel.
b. Resource Materials/Forms.
c. Internal Report/SOP.
d. Journals.
e. Review of open and closed files.
f. Medical Care Recovery Program methodology.
g. Property Damage Recovery Program methodology.
h. Relationship with installation resource offices.

13. Other General Requirements (UP AR 27-20, 1-7d; AR 27-1, chaps 3 & 7; TJAG Pol Ltr 87-2).
a. Investigation procedures.
b. Compliance with monetary jurisdictions and forwarding.
c. Publication of claims directive for guidance of claims processing offices within area requirements.
d. Liaison with and assistance to claims processing offices.
e. Budget for claims activities.
f. Legal publications/office library and legal research capabilities.
g. Development of written disaster/civil disturbance plan.

Appendix B

Office Evaluation Criteria

A. Priority #1--Serious--requires visit within 12 months.

1. a. Never visited.
b. Not visited within 3 years.
c. SJA requests visit.

2. Follow-up within 12 months noted as necessary on prior visit because of deficiencies noted, or major changes made.

3. PSR notes errors of sufficient quantity or severity to warrant on-site guidance; Affirmative Claims Branch notes problems.

4. Office staffing inadequate--new personnel or personnel shortage.

5. Change in mission of installation--expected growth.

B. Priority #2--Potential Problem--should be visited within 12 months.

1. New personnel or minor personnel shortage.

2. a. Not visited within 3 years.
b. Visit requested.

3. PSR notes errors of sufficient quantity or severity to warrant on-site guidance or notes gradual decline of quality of work or deviation in affirmative claims statistics.

4. Geographically compatible with office of higher priority.

C. Priority #3--Satisfactory--visit within 24 months.

1. PSR notes no real problem areas--want to ensure continued compliance with AR and policies.

2. New personnel.

3. a. Not visited within 3 years.
b. Visit requested.

4. Fits current travel schedule.

D. Priority #4--Outstanding work and experienced personnel.

1. Visit not necessary within 24 months unless requested or within travel area of offices being visited.

Claims Notes

Personnel Claims Note

This note is designed to be adapted to local circumstances and published in local command information publications as part of a command preventive law program.

Do-It-Yourself Moves (DITY Moves) and claims

The DITY move program, which allows the government to pay you to move your own household goods, is an excellent program that not only allows you to ensure that you receive a quality move, but also puts money in your pocket. You can rent or borrow a truck, pack up, and either hire a professional driver or just drive the truck away. Do not expect the government to pay you for breaking your own furniture as a loss incident to your service, however!

The Personnel Claims Act, which allows the Army to pay for damage in shipment, is a gratuitous payment statute. Despite rumors to the contrary, it is *not* insurance! Damages caused by failure to pack items properly, defects in the truck you select, or lack of driving skill are not compensable. For this reason, most claims arising from DITY moves are denied, and soldiers planning DITY moves should consider whether they need some type of private insurance.

The DITY move program compensates you for assuming the responsibility for making sure your move is successful. This includes making sure your move is damage-free!

Errata

In the Carrier Recovery Note in the February 1987 issue of *The Army Lawyer*, at 61, claims offices were reminded to enclose with the claims file a "Department of the Army (*i.e.*, 'franked') envelope authorized for posting as official mail," for forwarding carrier demands that are to be dispatched at the Claims Service. Though official Department of the Army envelopes must be used, these envelopes must not be prestamped ("franked"). Postage will be applied at Fort Meade.

Environmental Law Note

State Environmental Charges: Fees or Taxes?

Larry R. Rowe
Chief, Tax and Property Law Team, Contract Law Division, Office of The Judge Advocate General

Many installation staff judge advocates (SJA) are asked by their Director of Engineer and Housing (DEH) whether certain state or local environmental fees are legally payable the United States because the amount of these fees are becoming significant. When faced with these questions, the analysis used in the Tax and Property Law Team, Contract Law Division, OTJAG, may be useful. There is no case law directly on this issue.

Under the authority granted in the several federal environmental statutes, the states have enacted a wide variety of environmental fees. Inspection fees and permit fees are most common. Air quality fees for incinerators, waste water treatment facility fees, hazardous waste generators fees, fees for landfills, and fees for surface water impoundment are frequently encountered in many states. Many states set the amount of environmental fees at a rate designed to recover from the regulated community the operating costs of the particular program. That is, a state takes the total cost of a program and divides that cost by the number of regulated entities. This method is adequate when private entities are assessed, but when applied to the United States, it can result in a charge that amounts to an illegal tax.

Even though Congress has waived federal immunity from regulation by the several states[1] in the Clean Air Act,[2] the Federal Water Pollution Control Act,[3] and the Resource Conservation and Recovery Act,[4] it did not waive the United States' immunity from taxation by the states.[5] Increasingly, we are advising Army commands that state or local environmental fees appear to be illegal attempts to tax the United States.

How can you tell a legitimate fee from an illegal tax? Although there is no easy test, the Department of Defense has directed that we use a three-element test:[6]

1. Is the charge nondiscriminatory; *e.g.*, does the state or locale exempt itself from the charge but not the United States?

2. Is the charge a fair approximation of the costs of the benefits received?

3. Is the charge structured to produce revenue for the state or locale over and above the costs of issuing the permit or rendering of other assistance to the regulated community?[7]

These three elements are difficult to apply by themselves, but the United States Supreme Court provided additional guidance, particularly useful with the second element, in *National Cable Television Ass'n v. United States:*

> Taxation is a legislative function and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.[8]

In *National Cable Television*, the plaintiff protested the fee charged cable TV companies by the Federal Communications Commission (FCC) to support its direct and indirect costs of CATV regulation. While some benefits from FCC regulation flowed to the broadcasters, the Court found that the costs of benefits flowing primarily to the general public were taxes that the FCC could not collect. Applying these principals to environmental charges, we conclude that costs of specific benefits that flow from the state to the regulated community (*i.e.*, the Army) are legitimate fees. Costs of benefits that flow to the general public are taxes that the Army cannot pay.

National Cable Television spawned additional litigation that is helpful in understanding the specific-benefit-to-specific-recipient element. The National Cable Television Association and others sued the FCC challenging its fee schedule.[9] Court of Appeals for the District of Columbia held that an agency can institute a system of user fees that recovers the full direct and indirect costs incurred by it in providing a service or good to a particular beneficiary. The court further held that the fee must be directly related to specific services provided to a specific person or entity, and

[1] Hancock v. Train, 426 U.S. 167 (1976).

[2] 42 U.S.C. § 7417 (1982).

[3] 33 U.S.C. § 1323 (1982).

[4] 42 U.S.C. § 6961 (1982).

[5] McCullough v. Maryland, 17 U.S. (Wheat.) 316 (1819).

[6] Memorandum from Assistant Secretary of Defense (Installations and Logistics), 4 June 1984, subject: State Environmental Taxes.

[7] These elements were derived from Massachusetts v. United States, 435 U.S. 444 (1978); *see also* United States v. Maine, 524 F. Supp. 1056 (D. Me. 1981).

[8] 415 U.S. 336, 340–41 (1974). *See also* Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974).

[9] National Cable Television Ass'n v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Indus. Ass'n v. FCC, 554 F.2d 1109 (D.C. Cir 1976); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976).

that the fee may not exceed the agency's cost of providing the service.

Applying the first of this three-element test to a particular fee—is it discriminatory—check the state statutes or local ordinances to determine whether the state or locale exempts itself from its environmental fees. If such an exemption exists for the state or locale but not for the United States, you should inform the state or locale that the fee is unconstitutionally discriminatory and cannot be paid.[10]

The second element—a fair approximation of the cost of the benefits received—must be measured as the court did in the *National Cable Television* cases. This is particularly difficult because often a charge contains an element for legitimate benefits rendered to your command. Nevertheless, the charge may so greatly exceed the cost to the state of providing the benefit that the excess portion of the charge is an illegal tax when applied to the United States. You must first determine what benefits, if any, are rendered by the environmental agency. Then you need to examine the facts to determine if the charge is a fair approximation of the cost of providing the benefits to your command. Of course, if no specific benefit is rendered to the command, the charge fails the second element.

For example, a state may charge a permit fee—a fee for processing and issuing a permit to discharge a substance or to operate a wastewater treatment facility. The state may charge $10 to issue the permit while the cost to the state of processing the permit is only $5. The excess $5 is an illegal tax when charged to the United States. But, you may be asking at this point, "How do we determine whether and to what amount a fee is excessive thereby becoming a tax?" This is a tough question to answer. We suggest you write to the state environmental authority requesting a breakdown of the costs to the state of rendering the benefit (such as issuing a permit or conducting inspections). Our experience is that the states will not or cannot provide this information because they have not conducted a cost-of-service study or because the legislature simply sets the amount of the fees without reference to costs. We recommend that your command not pay the fee until the state provides the cost breakdown because without it you cannot determine what part may be legitimate service charge and what pay may be an illegal tax on the United States.

As to the third element—revenue generator—you should examine the state statutes to see where the fee is deposited in the state's treasury. If the fee goes to a special fund used exclusively by the state's environmental agency to support the part of its program that provides the specific benefit to your command, the fee may be a payable user fee rather than a tax. If, on the other hand, the fee is deposited in the state's general revenues or the state's mini-superfund, it is almost certainly a tax because it is designed to produce revenues over and above those necessary to operate the state's permitting system. Such a fee fails the third element.

A proactive SJA should work closely with the DEH to ensure that all state and local environment fees are examined under this analysis to determine whether they should be paid. Because we want to maintain a consistent posture with state and local agencies, please forward copies of all correspondence with the state or local agency to us at HQDA, DAJA-KL, Washington, D.C. 20310-2200. We also are available to assist you in this troublesome area (AUTOVON 227-2376 or COM (202) 697-2376). Please contact us immediately if a state either threatens litigation or actually sues your command.

[10] Phillips Chemical Company v. Dumas Independent School District, 361 U.S. 376 (1960).

Automation Notes

Information Management Office, OTJAG

Defense Data Network Office Addresses

Since publishing two editions of the JAG Corps Defense Data Network (DDN) Electronic Mail Director (*see* The Army Lawyer, May and October 1987), an amazing fact has come to light—military people move! They get transferred, they leave the service, they go TDY. This may be fine for them, but sometimes it leaves their office without a DDN address. That means no electronic mail, and no safe, sure, reliable means of getting the message from here to there.

There also seems to be a subculture of DDN users who have enthusiastically embraced the possibilities of electronic mail and who use it regularly. These folks know each other and when they want to get a message to a non-DDN person, they know whose mailbox to put the message in so the non-DDN person will get the mail. People who are less familiar with DDN may not know who in a given office serves as the central mailbox; naturally, they are quite reluctant to use the system. The answer to these problems is to establish an office DDN address. Set up the account using your office symbol or some other acronym as the user name. For some examples, *see* The Army Lawyer, October 1987, at 63-64.

It is especially important that one person be responsible for monitoring and delivering the incoming mail. It only takes one or two delayed or undelivered messages to discourage new users from becoming regular users.

Enable Does Footnotes Right!

Who says the light at the end of the tunnel must be a freight train? For some time now, this office and you, our loyal users, have been encouraging The Software Group to do something about Enable's footnoting. They have listened and have brought forth Enable Version 2.15, which is now

in beta (prerelease) testing. The JAG Corps has been selected as one of the testers, and we have sent copies to several selected locations. These offices will evaluate the "real world" capabilities of Version 2.15. Based on our initial experiences with this new version, we are quite hopeful that Enable will satisfy all our word processing requirements, eliminating the need for other software products. As always, we welcome any suggestions you may have regarding improvements. Some of the most significant improvements in Version 2.15 include the following:

1. A complete footnoting utility that:
   a. does footnotes or endnotes;
   b. allows complete control over the placement and formatting of your footnotes;
   c. lets you customize the divider line between text and footnotes;
   d. allows custom footnote symbols and placement;
   e. permits three annotation styles: superscripted symbols in text and footnote; underscored symbols followed by a slash, and superscripted symbols in text, level in footnote;
   f. allows copy text between footnotes; and
   g. creates multiple page footnotes.

2. Password protection for word processing and spreadsheet files.

3. Automatic hyphenation.

4. Automatic control of widow and orphan lines.

5. Automatic document saving as you type.

6. Centering tabs.

7. Multiple line table of contents entries.

8. Extended functions. This is perhaps the most significant addition. It enables you to search for strings of text through all the documents on your disk, create and use multiple, nested subdirectories, and more.

9. True multitasking. You can start a given task and while it is processing in the background, carry out a different task on the screen.

It is expected that this version of Enable will be available on the Zenith Joint Microcomputer contract. In any event, take the initiative to upgrade those old copies of Version 1.15, either through the GSA software schedule or a local vendor. The race goes to the swift!

Enable Tips

Special Characters

Most typing needs can be satisfied by the alphabet and conventional punctuation marks. Sometimes, however, special characters, such as paragraph and section symbols, are needed to give your work product the professional touch. Enable makes it very easy to use these characters while you type.

When you want to use special characters within an Enable document, follow this sequence of keystrokes:

1. Press and release the F9 key.
2. Press and release the O key.
3. Press and release the C key.
4. Press and release the S key.

The Special Character set of symbols will display in a window across the bottom of your screen. The characters in the top row correspond to the characters engraved on your keyboard. The second row indicates which special characters will be produced when a given standard key is pressed. When you are finished using these characters, press and release the F9, O, C, O keys sequentially, as above. This will return you to your normal word processing screen.

Box Drawing

Now that you've developed an office reputation as a word processing pro by using the paragraph and section symbols, you will want to cement your place in history by preparing some nifty new forms and organization charts. Yes friends, Enable can do this for you too! Simply repeat Steps 1–3 as above, but press the B key in Step 4 (B for box drawing).

Again, a window will open and display both the engraved characters and the corresponding Box Drawing Set characters. Pressing and releasing the F9, O, C, and O keys sequentially will return your keys to their normal function.

For more information and to see these and other Special characters, see Section 5D of your Enable Word Processing manual.

Note: All of these characters can be produced on the ALPS P2000G dot matrix printer using the "O" printer driver. No representations are made with respect to other printers.

Bicentennial of the Constitution

Bicentennial Leadership Project Awards

The Council for the Advancement of Citizenship is sponsoring a series of Bicentennial Leadership Project awards. The awards recognize organizations and individuals that have played exemplary leadership roles in national or local activities commemorating the Constitution Bicentennial. Criteria for the awards include the degree of community involvement in planning and conducting the organization's projects, commitment to ongoing civic literacy beyond the Bicentennial, quality of scholarship, scope of project content, originality of idea, and the level of public participation in the project.

The awards are being presented at a series of Bicentennial workshops held around the country from December 1987 through May 1988. Army organizations were well-represented among the awardees at the first workshop, held in Washington, D.C., on December 3. The Judge Advocate General's School, the XVIII Airborne Corps and Fort Bragg, the U.S. Army Engineer Center and Fort Belvoir, and the U.S. Army Quartermaster Center and Fort Lee all

received organization awards. Individuals from Fort Lee, Fort Bragg, and the U.S. Army Training & Doctrine Command also received awards.

The Council will present awards at three other workshops: at Los Angeles, California, on January 29, 1988; at Saint Louis, Missouri, on March 11, 1988; and at the Council's Jennings Randolph Forum, in Washington, D.C. in May, 1988. The deadlines for submitting award nominations for the latter two workshops are February 17 and April 4, respectively. Information about awards and nomination forms are available from Ms. Beth Schneiderman, Council for the Advancement of Citizenship, 1724 Massachusetts Avenue, N.W., Suite 300, Washington, D.C. 20036, telephone (202) 857-0580.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

C&GSC Telephone Numbers Change

The following are new telephone numbers for ordering C&GSC student enrollment packets and for all types of student/course inquiries at Fort Leavenworth, KS:

Group I. Officers Whose Last Names Begin With A—E: 913/684-5584

Group II. Officers Whose Last Names Begin With F—K: 913/684-5615

Group III. Officers Whose Last Names Begin With L—R: 913/684-5618

Group IV. Officers Whose Last Names Begin With S—Z: 913/684-5407

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their units or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

February 1-5: 1st Program Managers' Attorneys Course (5F-F19).

February 8-12: 20th Criminal Trial Advocacy Course (5F-F32).

February 22-March 4: 114th Contract Attorneys Course (5F-F10).

March 7-11: 12th Administrative Law for Military Installations Course (5F-F24).

March 14-18: 38th Law of War Workshop (5F-F42).

March 21-25: 22nd Legal Assistance Course (5F-F23).

March 28-April 1: 93rd Senior Officers Legal Orientation Course (5F-F1).

April 4-8: 3rd Advanced Acquisition Course (5F-F17).

April 12-15: JA Reserve Component Workshop.

April 18-22: Law for Legal Noncommissioned Officers (512-71D/20/30).

April 18-22: 26th Fiscal Law Course (5F-F12).

April 25-29: 4th SJA Spouses' Course.

April 25-29: 18th Staff Judge Advocate Course (5F-F52).

May 2-13: 115th Contract Attorneys Course (5F-F10).

May 16-20: 33rd Federal Labor Relations Course (5F-F22).

May 23-27: 1st Advanced Installation Contracting Course (5F-F18).

May 23-June 10: 31st Military Judge Course (5F-F33).

June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

July 18-29: 116th Contract Attorneys Course (5F-F10).

July 18-22: 17th Law Office Management Course (7A-713A).

July 25-September 30: 116th Basic Course (5-27-C20).

August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).

August 1-May 20, 1989: 37th Graduate Course (5-27-C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

3. Civilian Sponsored CLE Courses

April 1988

2–9: NELI, Employment Law Briefing, Maui, HI.

5: PBI, Driving under the Influence, Indiana, PA.

6–8: LEI, Advocacy Skills: Discovery, Washington, D.C.

7–8: FBA, Indian Law Conference, Albuquerque, NM.

7–8: PLI, Deposing Expert Witnesses in Commercial Litigation, San Francisco, CA.

7–8: PLI, Title Insurance—Beyond the Boilerplate, Tampa, FL.

7–8: PLI, Employment Litigation, New York, NY.

8: PBI, Civil Litigation Update, Washington, PA.

8–9: ALIABA, Improving Lawyer Supervision to Prevent Discovery Abuse, Washington, D.C.

10–14: NCDA, Prosecution of Violent Crime, Incline Village, NV.

11–12: PLI, Advanced Bankruptcy Workshop, New York, NY.

12: MICLE, Generation Skipping Tax and Family Income Shifting, Ann Arbor, MI.

12–14: LEI, Dynamics of Environmental Law, Atlanta, GA.

14–15: ALIABA, Minimizing Liability for Hazardous Waste Management, Boston, MA.

15–16: UKCL, Pre-Judgment and Post-Judgment Remedies, Lexington, KY.

17–21: NCJFC, Case Management in Juvenile Justice, Portland, OR.

18–19: LEI, Trial Evidence: A Videotaped Lecture Series, Washington, D.C.

18–20: GCP, Competitive Negotiation Workshop, Washington, D.C.

19: MICLE, Workouts, Grand Rapids, MI.

20–22: LEI, Advanced Bankruptcy, Washington, D.C.

21: MICLE, Workouts, Troy, MI.

21–22: FBA, Tax Law Conference, Washington, D.C.

21–22: PLI, Tax Exempt Financing, San Francisco, CA.

21–22: PLI, Title Insurance—Beyond the Boilerplate, San Francisco, CA.

21–22: PLI, Financial Services Institute, New York, NY.

22: PBI, Driving under the Influence, Mercer, PA.

22–23: NCLE, Workers' Compensation, Omaha, NE.

24/5–13: NJC, General Jurisdiction, Reno, NV.

25–26: PLI, Legal Ethics, New York, NY.

25–26: BNA, Criminal Tax Fraud, Washington, D.C.

26: PLI, Negotiations Workshop, New York, NY.

27–28: LEI, Writing for Attorneys, Washington, D.C.

28: LEI, Discovery Techniques: A Videotaped Lecture Series, Washington, D.C.

28–29: PLI, Construction Contracts and Litigation, New York, NY.

28–30: PLI, Workshop on Direct and Cross Examination, San Francisco, CA.

29: NKU, Family Law, Highland Hts., KY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1987 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Requirement

Twenty-eight states currently have a mandatory continuing legal education (MCLE) requirement. The latest additions are Florida and Louisiana, whose programs were effective 1 January 1988. In addition, Missouri has stayed implementation of MCLE until 1 July 1988.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (Oct. 1986) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269–1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520–S Denver, CO 80202 (303) 893–8094	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually.

State	Local Official	Program Description
Delaware	Commission of Continuing Legal Education 706 Market Street Wilmington, DE 19801 (302) 658–5856	—Active attorneys must complete 30 hours of approved continuing legal education per year. —Reporting date: on or before 31 July every other year.
Florida	The Florida Bar Tallahassee, FL 32301–8226 (904) 222–5286 (800) 874–0005 out-of-state	—Effective 1 January 1988. —Active attorneys must complete 30 hours of approved continuing legal education (including 2 hours of legal ethics). —Active duty military are exempt but must declare exemption during reporting period. —Reporting date: Assigned monthly deadlines, every three years.
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527–8710	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342–8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
*Indiana	Clerk of the Supreme Court Continuing Legal Education Program State of Indiana Room 217, State House Indianapolis, IN 46204	—Attorneys must complete 36 hours of approved continuing legal education within a three-year period. —At least 6 hours must be completed each year. —Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281–3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23–S Topeka, KS 66612–1507 (913) 357–6510	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually.
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564–3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566–1600	—Effective 1 January 1988. —Active attorneys must complete 15 hours of approved continuing legal education every year. —Active duty military are exempt but must declare exemption. —Reporting date: 31 January annually beginning in 1989.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 So. Robert Street Suite 310 St. Paul, MN 55107 (612) 297–1800	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 30 June every third year.

State	Local Official	Program Description
*Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS 39225–2168 (601) 948–4471	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually.
Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635–4128	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Implementation stayed until 1 July 1988. —Reporting date: 30 June annually beginning in 1988.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442–7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826–0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., N.E. Albuquerque, NM 87125	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 January 1988 or first full report year after date of admission to Bar.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255–1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524–2365	—Active attorneys must complete 12 hours of approved legal education per year. —Active duty military are exempt, but must declare exemption. —Reporting date: 1 April annually, beginning in 1987.
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799–5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee 3622–A West End Avenue Nashville, TN 37205 (615) 385–2543	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt. —Reporting date: 31 January.
*Texas	Texas State Bar Attention: Membership/CLE P. O. Box 12487 Capital Station Austin, TX 78711 (512) 463–1382	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: Depends on birth month.
*Vermont	Vermont Supreme Court Committee of Continuing Legal Education 111 State Street Montpelier, VT 05602 (802) 828–3279	—Active attorneys must complete 10 hours of approved legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.

State	Local Official	Program Description
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786–2061	—Active attorneys must complete 8 hours of approved continuing legal education per year. —Reporting date: 30 June annually beginning in 1987.
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121–2599 (206) 448–0433	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E–400 State Capitol Charleston, WV 25305 (304) 346–8414	—Attorneys must complete 6 hours of approved continuing legal education between 1 July 1986 and 30 June 1987; 6 hours between 1 July 1987 and 30 June 1988; and 24 hours every two years beginning 1 July 1988. —Reporting date: 30 June annually.
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703–3355 (608) 266–9760	—Active attorneys must complete 30 hours of approved continuing legal education every two years. —Reporting date: 31 December of even or odd years depending on the year of admission.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003 (307) 632–9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Current Material of Interest

1. TJAGSA Publications Available Through Defense Technical Information Center (DTIC)

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. New this month are several Legal Assistance publications, replacing several All-States Guides.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs) (note corrected number).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pgs).
AD B116101	Legal Assistance Wills Guide/ JAGS–ADA–87–12 (339 pgs).
AD B116100	Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).
AD B116097	Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).
AD B116099	Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).

AD B095857 Proactive Law Materials/ JAGS-ADA-85-9 (226 pgs).

AD B116103 Preventive Law Series/JAGS-ADA-87-10 (205 pgs).

Claims

AD B108054 Claims Programmed Text/ JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).

AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).

AD B100235 Government Information Practices/ JAGS-ADA-86-2 (345 pgs).

AD B100251 Law of Military Installations/ JAGS-ADA-86-1 (298 pgs).

AD B108016 Defensive Federal Litigation/ JAGS-ADA-87-1 (377 pgs).

AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS-ADA-86-9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).

AD B088204 Uniform System of Military Citation/ JAGS-DD-84-2 (38 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 5-23	Army Major Item Systems Management		26 Nov 87
AR 37-47	Financial Administration	101	4 Nov 87
AR 140-30	Active Duty In Support of the U.S. Army Reserve (USAR) and Active Guard Reserve (AGR) Management Program		13 Nov 87
AR 600-63	Army Health Promotion		17 Nov 87
DA Pam 600-63-1	Fit To Win		Sep 87
DA Pam 600-63-3	Marketing Module Fit To Win		Sep 87
DA Pam 600-63-5	Physical Conditioning Fit To Win		Sep 87
DA Pam 600-63-8	Substance Abuse Fit To Win		Sep 87
DA Pam 600-63-9	Fit To Win Hypertension		Sep 87
DA Pam 600-63-11	Dental Health Fit To Win		Sep 87
DA Pam 600-63-12	Fit To Win Spiritual Fitness		Sep 87
DA Pam 600-63-13	Procedures Guide Fit To Win		Sep 87
DA Pam 600-64-14	Fit To Win Handbook		Sep 87
DA Pam 608-33	Casualty Assistance Handbook		17 Nov 87
DA Pam 700-126	Basic Functional Structure		13 Nov 87
JFTR	Joint Federal Travel Regulations Vol. II	266	1 Dec 87
UPDATE 11	Message Address Directory		30 Oct 87

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Almond, *Nuclear Weapons, Nuclear Strategy and Law*, 15 Den. J. Int'l L. & Pol'y 283 (1987).

Annual Survey of Texas Law, 41 Sw. L.J. 1 (1987).

Baldwin, *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. Fla. L. Rev. 505 (1987).

Bird, *Discovery from the Federal Government*, Litigation, Summer 1987, at 19.

Borison, *Innocent Spouse Relief: A Call for Legislative and Judicial Liberalization*, 40 Tax Law. 819 (1987).

Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361 (1987).

Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011 (1987).

Derby, *Coming to Terms with Terrorism—Relativity of Wrongfulness and the Need for a New Framework*, 3 Touro L. Rev. 151 (1987).

Graham, *Evidence and Trial Advocacy Workshop: Hearsay Exceptions—An Overview*, 23 Crim. L. Bull. 442 (1987).

Greenwood, *The Concept of War in Modern International Law*, 36 Int'l & Comp. L.Q. 283 (1987).

Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. Va. L. Rev. 933 (1987).

Henry, *The Criminal Defense Counsel's Concise Guide to Prejudicial Judicial Communication During Criminal Jury Trials*, 23 Crim. L. Bull. 413 (1987).

Kaplan, *Defending Guilty People*, 7 Bridgeport L. Rev. 223 (1986).

Spjut, *When Is an Attempt to Commit an Impossible Crime a Criminal Act?*, 29 Ariz. L. Rev. 247 (1987).

Swann, *Euthanasia on the Battlefield*, 152 Mil. Med. 545 (1987).

Terrorism and the Law: Protecting Americans Abroad, 19 Conn. L. Rev. 697 (1987).

Turner, *Myths and Realities in the Vietnam Debate*, 9 Campbell L. Rev. 473 (1987).

Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum. L. Rev. 1137 (1987).

Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 Am. U.L. Rev. 825 (1987).

Comment, *Espionage: Anything Goes?*, 14 Pepperdine L. Rev. 647 (1987).

Comment, *Reason and the Rules: Personal Knowledge and Coconspirator Hearsay*, 135 U. Pa. L. Rev. 1265 (1987).

Comment, *Tortious Interference With Visitation Rights: A New and Important Remedy for Non-Custodial Parents*, 20 J. Marshall L. Rev. 307 (1986).

Note, *Application Problems Arising From the Good Faith Exception to the Exclusionary Rule*, 28 Wm. & Mary L. Rev. 711 (1987).

Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 Va. L. Rev. 1111 (1987).

Note, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 Ind. L. Rev. 709 (1987).

* U.S. G.P.O. 1988-201-420:80134

By Order of the Secretary of the Army:

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